92-1589

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EXXON SHIPPING COMPANY,
Petitioner,

v.

THEODORE M. ELLENWOOD and ANN M. ELLENWOOD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state handicap discrimination laws should govern maritime employment relationships that are not local in character when such laws differ from state to state thereby disrupting the uniformity of maritime law.

2. Whether section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a), preempts state handicap discrimination claims and related state common law contract claims against federal contractors.

3. Whether maritime law recognizes an implied contract of employment based on the terms of an employee policy statement.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the First Circuit, entered on January 14, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 984 F.2d 1270 and is reproduced in the Appendix at 1-38. The pertinent opinion of the United States District Court for the District of Maine is reported at 6 IER Cases (BNA) 1623 (D. Me. 1991), and is reproduced in the Appendix at 39-48.

JURISDICTION

The decision of the Court of Appeals for which review is sought was entered on January 14, 1993. On January 28, 1993, petitioner Exxon Shipping Company

("Exxon Shipping")[1] filed a petition for a rehearing which the Court of Appeals denied on February 23, 1993. On March 12, 1993, the First Circuit stayed issuance of the mandate until April 2, 1993. This petition for a writ of certiorari is timely pursuant to 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Rehabilitation Act of 1973, 29 U.S.C. § 793(a), provides, in relevant part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

The Maine Human Rights Act, 5 Me. Rev. St. Ann. § 4571, provides:

> The opportunity for an individual to secure employment without discrimination because of race, color, sex, physical or mental disability, religion, age, ancestry or national origin is recognized as and declared to be a civil right.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-4.1, provides:

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[1] Rule 29.1 Statement: The parent company of petitioner Exxon Shipping Company is Exxon Corporation.

> All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment.

The Texas Commission on Human Rights Act, Tex Rev. Civ. Stat. Ann. Art. 5221k, § 5.01, provides:

> It is unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age; or
>
> (2) to limit, segregate, or classify an employee or applicant for employment in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, disability, religion, sex, national origin or age.

STATEMENT OF THE CASE

In reversing the district court's ruling, the First Circuit held that maritime courts must enforce claims based on handicap discrimination laws enacted by the various states. The decision, in practical terms, imposes on maritime employers obligations under differing and often inconsistent state handicap discrimination laws even where —as in this case—no single state has a particular interest in the controversy between the maritime employer and the seaman. Under the First Circuit's ruling, the rights of individual crew members on board a ship sailing the high seas will differ widely, potentially depending on such circumstances as the residence of a particular seaman, the ports at which a ship calls, the location of an

employer, or other factors—no matter how *de minimis*—that permit a state to assert jurisdiction over a particular claim.

The Court of Appeals' decision also reversed the district court's ruling that section 503 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 793, preempts claims of handicap discrimination against federal contractors. The First Circuit held that there is no federal interest in uniform standards of conduct for federal contractors and no congressional intent to preempt state law claims, a decision in sharp conflict with the Eleventh Circuit's opinion in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

In addition, the First Circuit recognized an implied employment contract based on a maritime employer's statement of an employee substance abuse policy, undermining the long established maritime principle of employment-at-will.

A. Background

Theodore M. Ellenwood ("Ellenwood") and his wife, Ann M. Ellenwood ("Mrs. Ellenwood"), filed a 14 count complaint arising from Exxon Shipping's reassignment of Ellenwood from a position as chief engineer on a 635-foot ocean-going oil tanker due to his history of substance abuse. A.3 n.1, 39. Ellenwood, a resident of Maine, was employed by Exxon Shipping, a Delaware corporation with headquarters in Texas. Ellenwood sailed on the high seas and in the coastal waters of a number of states along the Atlantic and Gulf coasts. A.42-43 n.5.

In 1989, "[s]hortly after the *Exxon Valdez* struck a reef off the Alaskan coast," Exxon Shipping adopted a revised employee substance abuse policy. A.2. That policy prohibited a person, such as Ellenwood, who had a history of substance abuse, from holding a specifically "designated," safety-sensitive position. The position of

chief engineer on an oil tanker was among those "desinated" as safety-sensitive under Exxon Shipping's revised policy. "Designated" positions were narrowly defined under the Exxon Shipping policy as those which are critical to the safety of the public-at-large, the environment or other employees and, in addition, meet each of the following requirements: (1) have a high exposure to a catastrophic accident; (2) have a key and direct role in the operating process where failure would cause a catastrophic accident; and (3) have no direct or very limited supervision readily available to provide operational checks (the "1989 Policy"). Tr. Vol. II at 106-113; Defendant's Ex. 66 at B00697-700. Under that 1989 Policy, challenged here, Ellenwood was not terminated but was offered reassignment to non-"designated" positions at pay and benefits identical to those earned in his prior position. Joint Ex. 24; Tr. Vol. II at 179.

Ellenwood refused to accept any of the reassignments offered to him by Exxon Shipping and, along with his wife, filed this action. Ellenwood asserted claims based on Maine, New Jersey and Texas handicap discrimination statutes; breach of contract; breach of an implied covenant of good faith and fair dealing; estoppel; wrongful discharge in violation of public policy; misrepresentation; fraud; defamation; intentional and negligent infliction of emotional distress; and three separate counts of invasion of privacy. A.3 n.1. Mrs. Ellenwood asserted claims for intentional and negligent infliction of emotional distress and loss of consortium. *Id.* Jurisdiction of the district court was invoked by Ellenwood pursuant to 28 U.S.C. § 1332. Complaint ¶ 5.[2] In addition, Ellenwood simultaneously filed a separate claim alleging substantially identical facts under section 503 of the Rehabilitation Act with the Department of Labor's Office of Federal

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[2] Following the entry of judgment in the district court, the Court of Appeals granted the State of Maine permission to intervene in this action on the issue of whether federal law preempted Ellenwood's claim based on the Maine Human Rights Act. A.3 n.2.

Contract Compliance Programs ("OFCCP"). In that complaint Ellenwood also asserted that he was unlawfully discriminated against on the basis of his handicap. *See* Exhibit C to Hayes Affidavit in support of defendant's motion for summary judgment. (Dist. Ct. Clerk Doc. No. 46.)

B. The District Court Decision

Three elements of the decision by the district court are relevant here. First, the district court dismissed Ellenwood's state law claims of handicap discrimination, following the ruling of the Court of Appeals for the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), and holding that section 503 of the Rehabilitation Act preempts Ellenwood's claims of handicap discrimination. A.42. Second, the district court held that Ellenwood's handicap discrimination claims were not cognizable under maritime law. A.42 n.3.

Third, the district court permitted Ellenwood's breach of contract and promissory estoppel claims—both based on Exxon Shipping's 1987 employee substance abuse policy—to go to the jury. A.41, 44. The jury returned a verdict in favor of Ellenwood on those claims in an amount of $677,648. A.3.[3]

C. The First Circuit Decision

1. *Maritime Preemption*

The First Circuit held that maritime courts must recognize claims based on state handicap discrimination laws. The First Circuit found irrelevant the assertion by Exxon Shipping (and the finding of the district court) that application of various state handicap discrimination statutes would undermine the "harmony and uniformity"

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[3] In addition, the district court dismissed Ellenwood's claims for punitive damages and held, as a matter of law, that Exxon Shipping was not liable to either Ellenwood or Mrs. Ellenwood for infliction of emotional distress. Each of these rulings was affirmed by the First Circuit. A.26, 29.

of maritime law. A.16. The First Circuit said that "a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country." A18. State law claims, the First Circuit said, should be "foreclosed" in maritime cases "only if the state law in question frustrates a fundamental tenet of admiralty law." *Id.*

The Court of Appeals rejected the proposition that the harmony and uniformity of maritime law constitutes such a "fundamental tenet," A.20, noting that "we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes . . ." A.18. The First Circuit held that the absence in maritime law of any prior recognition of a claim for handicap discrimination "is not a reason to dismiss the state claim but a basis upon which to give effect to the state provisions." A.19.

2. *Rehabilitation Act Preemption*

The Court of Appeals, contrary to the holding of the district court, also found that Ellenwood's handicap discrimination claims are not preempted by section 503 of the Rehabilitation Act. A.14. The First Circuit, in finding that Congress had indicated no interest in a uniform system for handling handicap discrimination claims brought against federal contractors, rejected the contrary analysis of section 503 by the Court of Appeals for the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983). A.11. The First Circuit discounted the statement in a 1984 Senate Report that indicated section 503 "be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result," A.8, finding that Congress's sole concern was coordination between the Department of Labor and the Department of Health, Education and Welfare. A.8-9. The First Circuit further found that there was no basis to infer a Congressional intent to preempt state law claims

since, the Court of Appeals stated, Ellenwood's handicap discrimination claim "does not threaten the *uniformity* of the § 503 system." A.11. In essence, the First Circuit found that independent state law claims against federal contractors could co-exist with the section 503 administrative scheme even if such co-existence requires federal contractors to face incongruent rules of conduct in the area of handicap discrimination.

3. *Maritime Employment At-Will Doctrine*

Finally, the First Circuit concluded that a maritime employer may bind itself to an employment contract by issuance of an employee substance abuse policy. A.20-21. In a departure from the long-established maritime principle of employment-at-will, the Court of Appeals held that Exxon Shipping entered into an enforceable employment contract when it issued its 1987 employee drug and alcohol policy.

The Court of Appeals found that the maritime employment-at-will doctrine was not implicated in this case because "a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees." A.21. The First Circuit did not analyze whether such an employment contract or promise should be recognized when contained in a statement of employee policies, and it did not mention that no maritime court—until this case—had ever enforced such a contract.

REASONS FOR GRANTING THE WRIT

There are three reasons why the Court should grant Exxon Shipping's request for a writ of certiorari. First, the decision of the Court of Appeals imposes on maritime employers, for the first time, obligations under differing and often inconsistent state handicap discrimination laws. The decision is in conflict with Supreme Court authority on the need for uniformity in maritime law, and will cause substantial confusion in the relationship between maritime employers and seamen. This in turn will result

in disruption to an industry essential to the national interest. The important federal question of whether maritime law effectively preempts state handicap discrimination laws is one which the Court should decide.

Second, the decision of the First Circuit holding that section 503 of the Rehabilitation Act does not preempt Ellenwood's handicap discrimination claims conflicts with the Eleventh Circuit's conclusion in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983). The Eleventh Circuit has held that Congress intended that federal contractors face uniform standards in meeting obligations to employees with handicaps; the First Circuit found no such intent. The conflict is significant: federal contractors within the First Circuit now face the myriad of state handicap discrimination laws; those in the Eleventh Circuit do not. The Court should resolve this conflict.

Third, the recognition by the First Circuit of a maritime employment contract implied from an employee policy statement raises an important question of federal law. This decision by the Court of Appeals is apparently a ruling of first impression. It too promises to have a broad impact on the maritime industry; the First Circuit decision should be reviewed by the Court.

I. THE DECISION OF THE FIRST CIRCUIT IMPOSING ON MARITIME EMPLOYERS VARYING OBLIGATIONS UNDER STATE HANDICAP DISCRIMINATION LAWS IS OF NATIONAL IMPORTANCE, IS IN CONFLICT WITH SUPREME COURT PRECEDENT, AND SHOULD BE REVIEWED BY THE COURT

Incorporating into maritime law the varying discrimination laws of 50 states undermines the uniformity and harmony which has been an intrinsic tenet of admiralty law since its inception. No precedent from this Court or from any other circuit court supports the holding of the First Circuit that varying state handicap discrimination

laws and regulations must be engrafted into maritime law.

As a matter of public policy, there are two critical maritime interests that require protection: one is protection of the harmony and uniformity of admiralty law; the second is maritime law's traditional interest in the protection of the seaman. Contrary to the decision of the First Circuit, neither of these interests needs to be sacrificed here to further the other. Undermining the harmony of maritime law is unnecessary to meet admiralty's interest in protecting seamen. As Ellenwood has here, each seaman has a federal remedy for discrimination based on handicap under either section 503 of the Rehabilitation Act or, as of last year, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The goal of showing special solicitude to the seaman need not be met here at the expense of maritime uniformity.

Additionally, maritime law is well developed in defining the respective rights and obligations of the employer and the seaman. There is not, contrary to the view of the First Circuit, a gap in this area of maritime law that warrants supplementation with inconsistent state statutes.

A. The Incorporation of State Handicap Discrimination Laws Into Maritime Law Will Inject Great Uncertainty into the Law Governing Maritime Employment

The decision of the First Circuit incorporating state handicap discrimination laws into maritime law injects the very uncertainty into admiralty that the Court has consistently eschewed. *See, e.g., Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982) (noting that "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities"). Review by the Court is warranted to determine whether introduction of so disparate a body of law into admiralty is appropriate. Under the decision of

the First Circuit, not only will maritime employers face differing obligations under particular state handicap discrimination laws, the same employer may well face different duties and liabilities toward various crew members on a single ship in the midst of a particular voyage. Such an outcome, in an area of developing rights and duties such as handicap discrimination law, does violence to the intrinsic purpose of maritime law—maintenance of a uniform and consistent code of conduct for an industry whose operations touch a multitude of jurisdictions. This is not to say that a rigid uniformity is always required in maritime law. Neither is it to say that state law may not properly supplement maritime law. But where, as here, the substantive body of state laws is so incongruant, and where, as here, there are no particular local interests which are dominant, there simply is no place for incorporating an array of inconsistent state laws into maritime law.

Not surprisingly, there is substantial, and in some areas, increasing disharmony in the body of state handicap discrimination laws and rules. Substantively, states treat various disabilities differently. For example, states differ as to whether AIDS and its related illnesses are protected handicaps. *Compare Hilton v. Southwestern Bell Tel. Co.*, 936 F.2d 823 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992) (holding that AIDS and AIDS-Related Complex are not protected handicaps under the Texas Commission on Human Rights Act), *with Estate of Behringer v. Medical Center*, 249 N.J. Super. 597, 592 A.2d 1251 (1991) (holding that AIDS is a qualified handicap under the New Jersey Law Against Discrimination). States also differ as to whether an employer can discriminate on the basis of obesity, *compare State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219-20, 491 N.Y.S.2d 106, 109-110, 480 N.E2d 695, 698-99 (N.Y. 1985) (holding that an employee's obesity was a disability under New York law) *with Civil Serv. Comm'n of City of Pittsburgh v. Pa.* 527 Pa. 315, 317, 591 A.2d 281, 283-84 (Pa. 1991) (rejecting claim that an employee's

obesity constituted a handicap under Pennsylvania law), and as to whether high blood pressure is a physical handicap protected by anti-discrimination laws. *Compare American Nat'l Ins. Co. v. Fair Employment and Hous. Comm'n*, 32 Cal.3d 603, 610, 186 Cal. Rptr. 345, 349-50, 651 P.2d 1151, 1155-56 (Cal. 1982) (recognizing high blood pressure as a physical handicap and forbidding discrimination based on this characteristic) *with Connolly v. Suffolk County Dep't of Civil Serv.*, 150 A.D.2d 373, 374-75, 540 N.Y.S.2d 821, 822 (2d Dep't), *app. denied*, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869 (1989) (finding that a denial of employment by reason of high blood pressure does not constitute discrimination). Similarly, state laws differ with regard to whether various forms of cancer constitute a protected handicap. *Compare Chrysler Outboard Corp. v. Dep't of Indus., Labor & Human Relations*, 13 Empl. Prac. Dec. (CCH) ¶ 11,526 (Wis. Cir. Ct. 1976) (holding that a person with lymphocytic leukemia is handicapped under Wisconsin law) *with Lyons v. Heritage House Restaurants, Inc.*, 89 Ill.2d 163, 170-71, 432 N.E.2d 270, 274 (Ill. 1982) (holding that a person with cancer of the uterus is not handicapped under Illinois law). If left unreviewed by the Court, the decision of the First Circuit invites, "as a general matter," A.20, each of these inconsistent statutes into the maritime law.

Further complicating the introduction of state handicap discrimination claims into maritime law are the substantial differences in remedies and processes among the various states. For example, some state human rights laws permit the recovery of punitive damages. *See, e.g., State v. Porter Farms*, 382 N.W.2d 543, 55 FEP Cases (BNA) 48, 55 (Minn. App. 1986); *Gallagher v. Wilton Enterprises*, 962 F.2d 120 (1st Cir. 1992) (considering Massachusetts Fair Employment Practices Act). Others do not. *See, e.g., Thoreson v. Penthouse International*, 80 N.Y.2d 490, 519 N.Y.S.2d 978, 606 N.E.2d 1369 (N.Y. 1992). Certain states permit recovery of compensatory damages. *See, e.g., Mountain Clay v. Commonwealth of*

Kentucky, 830 S.W.2d 395 (Ky. App. 1992). Again, others do not. *See, e.g., Harris v. International Paper Co.*, 765 F. Supp. 1509, 1525 (D. Me. 1991).

Similarly, procedural matters including the requirement to exhaust administrative remedies, the employers covered and the applicable statutes of limitations vary dramatically among state human rights laws In Florida, for instance, a complainant must file an administrative charge prior to bringing a civil action under the Florida Human Rights Act. *See Ali v. City of Clearwater*, 807 F. Supp. 701 (M.D. Fla. 1992). In New Jersey, on the other hand, a complainant may elect to file initially in state court. *See Ferrara v. Tappan Co.*, 722 F. Supp. 1204, 1205-06 (D. N.J. 1989). Maryland's Fair Employment Practices Act applies to employers with 15 or more employees. Md. Code Ann. Article 49B § 1 *et seq.* Massachusetts' Fair Employment Practices Act applies to employers with six or more employees, Mass. Gen. L. ch. 151B § 1, while the Michigan Civil Rights Act applies to an employer with a single employee. Mich. Comp. Laws Ann. 37.2101. The statutes of limitations among the state discrimination laws also vary considerably. In New Jersey, the handicap discrimination statute of limitations runs for six years. *See Miller v. Beneficial Management Corp.*, 776 F. Supp. 936, 960 (D. N.J. 1991). In Texas, civil actions under the Commission on Human Rights Act are governed by a 12 month statute of limitations. *See Jumper v. Conagra Int'l*, 58 FEP Cases (BNA) 1581, 1582 (W.D. Tex. 1992).

The inconsistency of state handicap discrimination laws —both as a matter of substance and procedure—is not unexpected. Prohibitions against discrimination based on handicap is an area of developing law. Legislatures, administrative agencies and courts may, and do, differ reasonably over just what constitutes a "handicap" and what is the proper balance of public and private rights in developing a body of law aimed at protecting handicapped individuals from unlawful discrimination. Unlike

other areas of discrimination law, such as discrimination based on race, gender or age where the basis for the discrimination is almost always facially evident, the area of employment discrimination against persons with handicaps often involves a extraordinarily delicate balancing of legitimate, but competing interests. Fundamentally, as in the situation that gave rise to this action, issues of handicap discrimination often implicate a delicate balance of social values and public policy options. In many ways, precisely how those choices are made will differ from state to state and probably from time to time. That is exactly the type of uncertainty that will wreak havoc with the need for consistency in maritime law. It is why the Court should review the decision of the First Circuit which poses a substantial risk to the harmony of maritime law, and a consequential disruption to an industry of national importance.

B. Uniformity and Certainty Are Intrinsic and Fundamental Values of Maritime Law

The First Circuit correctly recognized that state law must be displaced in maritime cases when the state law "materially prejudices 'the characteristic features of maritime law.'" A.17-18, *citing* 1 *Benedict on Admiralty* § 112, at 7-36. But the Court of Appeals then proceeded to disregard the central importance that maritime law places on uniformity, ignoring the fact that uniformity is perhaps the most well-established "characteristic feature of maritime law." *See Southern Pacific Co. v. Jenson*, 244 U.S. 205, 216 (1917); *see also Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 322-23 (1990) (finding "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country"); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 n.6 (1982) (recognizing "the importance that Congress has attached to having all vessels operating on navigable waters governed by uniform rules and obligations"); *Moragne v.*

States Maritime Lines, Inc., 398 U.S. 375, 402 (1970); 1 Steven F. Friedell, *Benedict on Admiralty* § 105, at 7-12 to 7-13 (7th ed. 1992) (noting that "state legislation . . . is not permitted . . . to impair that uniformity which in international and interstate relations the Constitution designed to establish in conferring the maritime power upon the United States"); 1A Ellen M. Flynn *et al.*, *Benedict on Admiralty* § 2 (7th ed. 1991) (discussing "the doctrine that the maritime law must be uniform throughout the nation and state legislation may not introduce disharmonious elements").

In dicta, the First Circuit said that maritime law could preempt certain handicap discrimination claims where "employment of the handicapped would conflict with the maritime doctrine of seaworthiness." A.19-20. But, of course, one way or another, all decisions involving handicap discrimination may well implicate the seaworthiness doctrine. *See, e.g., Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989). Certainly, implementation of a maritime employer's substance abuse policies could bear on a vessel's seaworthiness. But the dismissal by the First Circuit of this concern, along with its failure to analyze the substantial disruption enforcement of inconsistent state handicap discrimination rules will cause maritime law, underscores the First Circuit's undervaluation of uniformity as an intrinsic interest of maritime law. The comment by the First Circuit that "[a]ll state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law" is simply off the point. A.17. This is not a case where there is a recognized basis for introducing state law claims into admiralty. No single state interest exists here to nullify admiralty's adherence to consistent standards of conduct.

It is true that state laws have been applied frequently (and properly) in cases—unlike this one—where there is a strong local interest in a particular controversy. This

"maritime but local" rule was first articulated in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), where the Court applied a state claim in the absence of a maritime wrongful death claim. The Court in *Garcia* found that the subject in dispute "is maritime and local in character" because it involved a death resulting from "a maritime tort committed on navigable waters *within a state* whose statutes give a right of action on account of death by wrongful act." *Id.* at 242 (emphasis added). The Court then found that application of the state statute:

> "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Id. Where state law has been applied by the Court in such maritime cases, it is because there is a significant local involvement with the case before the Court. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

There is no localized state interest present when, as here, a Maine resident (with shipmates from any of 50 states) sailing the high seas and touching the coastal waters of numerous states sues a Delaware corporation headquartered in Texas; dominant here is the federal interest in a uniform set of laws for maritime commerce. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 n.2 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961). Review by the Court is warranted to prevent that dominant federal interest from being battered by application of inconsistent state handicap discrimination laws.

C. There Is No Need To Undermine Maritime Law's Uniformity Since Seamen Already Have a Federal Remedy for Handicap Discrimination

Further, the disruption to the uniformity of maritime law caused by the First Circuit's decision cannot be justified by the need to craft a special maritime remedy for Ellenwood. This is not a case where an "employee-sensitive" outcome is required based on what the First Circuit called the "special solicitude for the welfare of seamen and their families." A.20, *quoting Miles*, 111 S. Ct. at 327. Here, Ellenwood already has a federal remedy. In September, 1989, he filed a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP"), alleging that Exxon Shipping's conduct toward him violated the Rehabilitation Act. *See* Exhibit C to Hayes Affidavit in support of defendant's motion for summary judgment (Dist. Ct. Clerk Doc. No. 46). In Ellenwood's OFCCP proceeding, which is pending, Ellenwood seeks, among other remedies, lost pay and reinstatement to his position as chief engineer. And, even for those maritime employees who sail without protection under the Rehabilitation Act, they now are protected—in a uniform fashion—by the obligations imposed by Congress nationwide under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

Even if the Court of Appeals ruled correctly that seamen should be provided a maritime claim in addition to their federal statutory claims, the Court should determine whether the definition of that claim is found in the statutes enacted by Congress--the Rehabilitation Act and the ADA—rather than in the inconsistent statutes and rules adopted by state legislatures and agencies in the 50 states. It is long-settled that in composing the body of maritime law, courts first look to Congressional enactments and then to decisions of the federal courts—principally the Supreme Court—before turning to state law for guidance. *See* 1A-Pt 2 James W. Moore, *et al.*, *Moore's Federal Practice* § 0.326 at 3233-35 (2nd ed. 1992) (dis-

cussing the hierarchy of sources for the development of maritime law). Here, the Rehabilitation Act and the ADA provide maritime courts with a uniform definition of a claim for employment discrimination on the basis of handicap. Deriving a maritime claim from these laws —based on the uniform substantive law arising from Congressional enactments—would avoid the disruption of the admiralty's interest in uniformity which, unless reviewed, will be the legacy of the First Circuit's decision.

D. There Is No Gap In Maritime Employment Law That Requires Supplementation by State Law Here

Finally, contrary to the finding of the First Circuit, there is no gap in maritime employment law warranting the supplementation of existing law by incorporation of state handicap discrimination laws. The district court properly noted that "maritime law has not addressed handicap discrimination," A.19, an observation that prompted the Court of Appeals to determine that a gap in maritime law needed to be filled. A.19. But the First Circuit's identification of a maritime law gap governing the employment relationship between seamen and employer is misplaced. That law already is highly developed. As the Fifth Circuit put it:

> "Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet."

Donovan v. Texaco Inc., 720 F.2d 825, 828 (5th Cir. 1983). *See also Southern Steamship Co. v. NLRB*, 316 U.S. 31, 38-39 (1942) (discussing that seamen are beneficiaries of detailed federal protection with Congressional enactments prescribing such things as medicines, clothing, heat, hours and wages). "As the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause

of action it thereby deprives the defendant of a substantive right to be free of an obligation." 1 Steven F. Friedell, *Benedict on Admiralty*, § 112 at 7-37 (7th ed. 1992), *citing Just v. Chambers*, 312 U.S. 383 (1941); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971).

Indeed, prior to the First Circuit's decision, each of the maritime cases that considered the application of state discrimination laws to admiralty law declined to enforce state claims. In *Belanger v. Keydril Co.*, 596 F. Supp. 823, 825-826 (E.D.La. 1984), *aff'd*, 772 F.2d 902 (5th Cir. 1985), the Fifth Circuit refused to recognize a maritime cause of action for discrimination based on age. And, in a maritime case closely on point, the Indiana Court of Appeals in *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989), held that maritime law preempted Indiana's handicap discrimination law.

In the area of maritime employment law, there is no gap that warrants incorporation of state handicap discrimination laws. It is appropriate for the Court to review the decision of the First Circuit incorporating state handicap discrimination laws into maritime law.

II. THE DECISION OF THE FIRST CIRCUIT CONFLICTS DIRECTLY WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *HOWARD v. UNIROYAL* WHERE STATE CLAIMS WERE FOUND PREEMPTED BY THE REHABILITATION ACT

The Court should also grant Exxon Shipping's petition for a writ of certiorari to resolve the question of whether section 503 of the Rehabilitation Act preempts state handicap discrimination law claims. The decision of the First Circuit is in sharp conflict with the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), which found a state contract claim preempted by section 503. In *Howard*, the Eleventh

Circuit recognized in section 503 a Congressional intent "to insure that there would be a uniform, consistent Federal approach to discrimination against handicapped persons by federal contractors." 719 F.2d at 1561. The First Circuit, on the other hand, dismissed *Howard's* finding that Congress intended a uniform and consistent approach to discrimination against handicapped persons by federal contractors. A.8-9. It is on this difference, the Eleventh Circuit's finding of an intent for uniformity and the First Circuit's failure to find such an intent, that the circuit courts reached opposing conclusions on the issue of federal preemption. Where, as the Eleventh Circuit held, uniformity is intended by Congress, federal preemption must follow. Where, as the First Circuit held, such uniformity is not intended by Congress, varying state handicap discrimination claims may be enforced. This is a conflict which the Court should resolve.

The analysis of the Court of Appeals for the Eleventh Circuit in *Howard* follows faithfully the preemption standards set down by the United States Supreme Court in *Pennsylvania v. Nelson*, 350 U.S. 497, 502-09 (1956). *See also Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). First, the *Howard* court found, the regulations promulgated by the Secretary of Labor under section 503 of the Rehabilitation Act are both comprehensive and pervasive and leave "no room" for state law claims of handicap discrimination against federal contractors. *Howard*, 719 F.2d at 1559. The First Circuit considered this irrelevant since it found that compliance with state law and section 503 was not a "physical impossibility," A.10, *quoting Florida Avocado & Lime Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). *But see Charleston v. W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and

a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go" (Holmes, J.)). Second, according to the Eleventh Circuit, the federal interest in regulating federal contractors is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." 719 F.2d at 1560. The First Circuit rejected the Eleventh Circuit's view that there is a "dominant" federal interest in the conduct of federal contractors. A.10-11. Finally, as the *Howard* court held, enforcement of state law claims presents a serious risk of undermining the express Congressional intent "to insure that there would be a uniform, consistent federal approach" to discrimination against handicapped persons by federal contractors. 719 F.2d at 1561. The reasoning of the *Howard* court—adopted by the district court here but rejected by the First Circuit—found that separate state law efforts to regulate conduct which gives rise to claims of discrimination against handicapped persons would "frustrate the uniformity of decision necessary to develop a consistent federal approach." *Id.* at 1562.

It is that federal interest in uniformity which serves as the foundation of the preemption analysis. And it is that foundation upon which the First and Eleventh Circuits split. In the First Circuit, as noted, the only cognizable Congressional interest in uniformity is the avoidance of inconsistencies between federal agencies. A.8-9. The First Circuit thereby sanctions inconsistencies resulting from enforcement of state claims; such inconsistencies are avoided by the Eleventh Circuit's preemption analysis. 719 F.2d at 1562.

In addition to rejecting the Eleventh Circuit's interpretation of Congressional intent, the First Circuit also sought to distinguish the state contract law claims raised in *Howard* from the state statutory claims raised by Ellenwood. A.11. The First Circuit, without analysis, detected a distinction in principles of preemption based on whether the state claims originate in statutory law,

as in the case of handicap discrimination, or common law, as was the case in *Howard*. The First Circuit's holding concludes that courts applying state *statutes* governing a federal contractor's conduct may permissibly undermine federal uniformity even if courts applying the state *common law* of contracts may not. But there is no principle in that distinction: for preemption to mean anything, it must operate on conduct, not legal theory. "[S]tate (and federal) courts generally may not adjudicate claims based on *conduct* that is protected or prohibited by federal labor law, or arguably so." *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1168 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (emphasis added). That is why the First Circuit's failure to preempt *both* Ellenwood's state handicap discrimination claims and state contract claims should be reviewed by the Court.

The First Circuit's effort to distinguish *Howard* simply underscores the conflict in reasoning and result between the Eleventh Circuit's decision in *Howard* and the First Circuit's decision here. The Court should resolve that conflict.

III. THE FIRST CIRCUIT'S RECOGNITION OF A MARITIME EMPLOYMENT CONTRACT IMPLIED FROM AN EMPLOYEE SUBSTANCE ABUSE POLICY WILL HAVE A BROAD IMPACT ON AN INDUSTRY VITAL TO THE NATIONAL INTEREST

In an apparent ruling of first impression, the First Circuit held that maritime law will recognize an employment contract inferred from a term contained in an Exxon Shipping employee policy statement. This ruling too raises an important issue of federal law having broad impact on the maritime industry. It should be decided by the Court.

In recognizing a contract of employment between Ellenwood and Exxon Shipping, the First Circuit held

that enforcement of a provision in Exxon Shipping's 1987 employee policy statement did not implicate a "new 'wrongful discharge' cause of action on behalf of Ellenwood." A.21. But, in fact, the First Circuit's holding that an employee policy statement can, by itself, override maritime law's employment-at-will doctrine constitutes a major erosion of the at-will doctrine. It is true that over the past generation the common law of certain states has carved out an exception to the employment at will doctrine by recognizing implied employment contracts in certain types of employee policy statements. *See, e.g., Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S. 2d 193, 443 N.E.2d 441 (N.Y. 1982) (holding that oral representations and an employee handbook promising discharge only for just cause created contractual obligation to refrain from termination of employee absent just cause). However, maritime law has never recognized such an implied contract—until the First Circuit decision here. It is a long-established precept of maritime law that absent "a contractual provision specifying a definite term or voyage during which a seaman will be employed, the seaman's employment is 'terminable at will by either party.'" *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1060 (5th Cir. Unit A 1981), *quoting Findley v. Red Top Super Markets, Inc.*, 188 F.2d 834, 837 n.1 (5th Cir.), *cert. denied*, 342 U.S. 870 (1951). Obviously, if an employer may terminate a maritime employee at-will, Exxon Shipping properly could reassign Ellenwood here.

There are sound policy reasons for a largely inflexible rule avoiding the recognition of implied contracts in maritime employment. As already noted, Congress has devised an elaborate and express scheme for regulating the relationship between a seaman and a shipowner. *See supra* at 18. And, until recently, absolutely no cause of action for wrongful discharge existed in maritime law

absent an express contractual agreement.[4] Then, in *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A 1981), the Fifth Circuit created a single, narrow exception to the at-will rule for maritime employment based on a discharge for filing a claim for personal injury under the Jones Act, 46 U.S.C. § 688, a statute enacted to provide a cause of action to injured seamen. But in recognizing that single, limited maritime cause of action, the Fifth Circuit said that in all other respects, a seaman may be discharged "for good cause, for no cause, or even in most circumstances, for a morally reprehensible cause." *Id.* at 1063. *See also Meaige v. Hartley Marine Corp.*, 925 F.2d 700, 702 (4th Cir.), *cert. denied*, 111 S. Ct. 2826 (1991) ("Under general maritime law, a seaman is an employee-at-will and may be discharged for any or no reason.").

Reviewing the laws of the various states, it is apparent that the prevailing law does not recognize an enforceable contract based on a statement in an employer's policy statement on employee substance abuse.[5] Courts that have confronted this issue typically have held that substance abuse policies distributed to at-will employees do not have the force of an employment contract and do not change an employee's at-will status. *See, e.g., Franklin v. Delta Airlines, Inc.*, 951 F.2d 359 (Table) (text in WESTLAW) (9th Cir. 1991) (rejecting plaintiff's claim that Delta's failure to adhere to the alcohol rehabilitation policy in the company's Standard Practices manual was a violation of an employment contract under Hawaii law); *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d

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[4] Ellenwood did not allege that he had an express contractual agreement based on anything other than Exxon Shipping's policy statements. *See* Complaint ¶¶ 48-51.

[5] In the absence of Congressional enactments, maritime courts look to the amalgam of state common law to fashion uniform admiralty precepts of substantive law. *See* 1A-Pt 2 James W. Moore *et al., Moore's Federal Practice* ¶ 0.326 at 3233-35 (2nd ed. 1992).

1194, 1195-96 (10th Cir. 1990) (holding that employee manual in which employer codified its rules and regulations with respect to drug use did not change at-will status of employee under Wyoming law). *But see Johnson v. Carpenter Technology Corp.*, 723 F. Supp. 180 (D. Conn. 1989) (enforcing under Connecticut law the terms of a substance abuse policy). In today's environment, an employer should be permitted to adopt employee substance abuse policies without fear that the policy—subject to changing circumstances—will become a binding contract of employment. The chilling effect the First Circuit's decision may have on the adoption of such policies is inconsistent with the public interest in maritime employers making good faith efforts to develop responsible policies concerning substance abuse in the workplace.

In sum, the Court should decide whether the First Circuit's erosion of the maritime employment-at-will doctrine is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 1, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1473

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs, Appellees,

v.

EXXON SHIPPING CO.,
Defendant, Appellant.

STATE OF MAINE,
Intervenor.

No. 92-1474

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs, Appellants,

v.

EXXON SHIPPING CO.,
Defendant, Appellee.

STATE OF MAINE,
Intervenor.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. BROCK HORNBY, *U.S. District Judge*]

Before

BREYER, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
and CYR, *Circuit Judge*.

Peter Bennett with whom *Daniel W. Bates* was on brief for the Ellenwoods.

Thomas D. Warren, Deputy Attorney General, with whom *Michael E. Carpenter*, Attorney General, was on brief for the State of Maine.

Robert M. Hayes with whom *Charles G. Bakaly, Jr.*, *Richard G. Moon*, and *Linda D. McGill* were on brief for Exxon Shipping Company.

January 14, 1993

COFFIN, *Senior Circuit Judge*. Shortly after the *Exxon Valdez* struck a reef off the Alaskan coast in 1989, defendant Exxon Shipping Company adopted a new policy barring any employee who had ever participated in an alcohol rehabilitation program from holding designated jobs within the company. Pursuant to this policy, plaintiff Theodore Ellenwood, who had no connection to the *Valdez* incident, was removed from his position as chief engineer of another Exxon oil tanker, the *Exxon Wilmington*. Ellenwood voluntarily had entered, and successfully had completed, a month-long alcohol rehabilitation program a year before the *Valdez* accident. Despite his concerns about his drinking, Ellenwood never had had an on-the-job problem with alcohol. A psychiatrist who examined Ellenwood in connection with this case concluded, in fact, that he had never been an alcoholic. *See* Tr. Vol. V, at 133.

Relying primarily on the company's previous written policy that "[n]o employees with alcoholism will have their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort," Ellenwood and his wife brought suit against Exxon alleging tort and contract claims as well as violations of state statutes prohibiting discrimination against the handicapped.[1] Ellenwood ultimately received a judgment for $677,648 on his contract and promissory estoppel causes of action.

In these appeals, both sides contend, *inter alia*, that the district court committed legal error in defining the actionable counts. Ellenwood claims the judge eliminated too many claims on various legal grounds, depriving him of additional relief, while Exxon claims that the court allowed too many counts to be tried.[2] We affirm most of

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[1] The complaint set forth the following causes of action: breach of contract (Count I); breach of a duty of good faith arising out of Exxon's use of confidential information concerning Ellenwood's alcohol treatment as a basis for removing him (Count II); estoppel arising out of Exxon's representations and promises (Count III); wrongful discharge in violation of the public policy promoting responsible treatment of alcoholism (Count IV); discrimination against the handicapped contrary to various state laws (Count V); misrepresentation over the career consequences of seeking alcohol treatment (Count VI); intentional and negligent infliction of emotional distress on both Ellenwoods in ending Ellenwood's career and disseminating confidential information concerning his condition (Counts VII and VIII); defamation in removing Ellenwood from his position as chief engineer (Count IX); invasion of privacy in the manner in which Exxon obtained the information about Ellenwood's treatment and disclosed it (Count X); invasion of privacy in placing Ellenwood in a false light (Count XI); invasion of privacy in publicizing confidential information (Count XII); Mrs. Ellenwood's loss of consortium (Count XIII); and punitive damages (Count XIV).

[2] This court granted the State of Maine provisional permission to intervene on the issue of whether Ellenwood's claim based on the Maine Human Rights Act, 2A Me. Rev. Stat. Ann. tit. 5, §§ 4571-72 (Supp. 1992), is preempted by federal law.

the court's rulings. We conclude, however, that the district court overestimated the preemptive effects of admiralty law and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796, and, accordingly, we must remand for trial on Ellenwood's state statutory claims of handicap discrimination.[3]

I. *Preemption and the Rehabilitation Act*[4]

A. *Background*

Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, requires any contract with the federal government in excess of $2,500 to include a provision obligating the federal contractor to "take affirmative action to employ and advance in employment qualified individuals with handicaps." 29 U.S.C. § 793(a). Any handicapped individual who believes a contractor has failed to comply with this provision may file a complaint with the Department of Labor, which must conduct an investigation and take appropriate action. 29 U.S.C. § 793(b). Regulations promulgated pursuant to § 503 specify a detailed administrative enforcement mechanism for its breach. *See* 41 C.F.R. §§ 60-741.1-741.32 (1991). The Department's Office of Federal Contract Compliance Programs (OFCCP) is empowered, for example, to seek injunctive relief in court, terminate or cancel a contract, or bar a contractor from receiving future contracts. 41 C.F.R. § 60-741.28(b)-(e) (1991). It also may seek such remedies as back pay and reinstatement for affected employees. *See Dep't of Labor* v. *Texas Indus., Inc.*, 47 Fair Empl. Prac. Cas. (BNA) 18, 28 (Dep't Labor 1988).

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[3] The complaint referred to statutes in Maine, New Jersey and Texas, and we offer no view as to the applicable law. We note, however, that the district court applied Texas law to Count XII of the complaint, which alleged an invasion of privacy. *See* Memorandum of Decision, Oct. 28, 1991.

[4] Our review of the district court's preemption decisions, which were rulings of law, is plenary.

See Howard v. *Uniroyal, Inc.*, 719 F.2d 1552, 1559 (11th Cir. 1983) (detailing enforcement procedures).

In a motion for summary judgment, Exxon, which is a federal contractor, argued that § 503 preempts virtually all of Ellenwood's state law claims,[5] and that Ellenwood's only recourse on matters related to his alcohol treatment is the claim he has filed with the OFCCP. The district court rejected this contention, finding no evidence that Congress intended the provision to eliminate conventional state law claims such as breach of contract, misrepresentation, defamation or infliction of emotional distress, because these claims "are in no way related to the federal Rehabilitation Act, any affirmative action clause in a government contract, or handicap discrimination." *See* Memorandum of Decision, Oct. 15, 1991, at 3. The court also ruled, however, that § 503 did preempt Count V's direct claim of discrimination on the basis of handicap in violation of various state statutes, and Count IV's common law claim that Ellenwood's discharge violated a public policy promoting responsible treatment of alcoholism.

Neither party is satisfied with this Solomonic division of the claims. Accordingly, on appeal, we are asked to consider both Ellenwood's claim that the district court erred in ruling that § 503 preempts Counts IV and V and Exxon's contrary assertion that the district court erred in finding that the federal statute does not preempt the contract and promissory estoppel claims on which Ellenwood received a jury verdict. The State of Maine joins Ellenwood in arguing that § 503 does not preempt a claim of handicap discrimination brought under its Human Rights Act, 2A Me. Rev. Stat. Ann. tit. 5, § 4571-72 (Supp. 1992). We take up each plea for reversal in turn, following a brief review of the well established contours of preemption law.

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[5] According to Exxon, only Counts X and XII of the complaint, charging the company with obtaining and disclosing private information, survived preemption.

B. *Preemption Principles*

The preemption doctrine is rooted in the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to, the laws of congress." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). A court's sole task in determining whether a state statute is preempted is to ascertain whether Congress intended the federal law to have such effect. *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280 (1987); *Massachusetts Medical Society* v. *Dukakis*, 815 F.2d 790, 791 (1st Cir. 1987). Although Congress may articulate its intent explicitly, *see, e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 532 (1977), it does not always do so, and the challenge of preemption law is to identify occurrences of implied preemption. Preemption by implication may take place in different ways.

First, congressional intent to preempt state law may be inferred when the scheme of federal regulation in a particular area is sufficiently pervasive and complex "to make reasonable the inference that Congress 'left no room' for supplementary state regulation," *California Federal Savings & Loan Ass'n*, 479 U.S. at 281 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Dukakis*, 815 F.2d at 791. Second, in areas where Congress has not entirely displaced state regulation, state law will be deemed preempted to the extent it actually conflicts with federal law. Such a conflict occurs either because " 'compliance with both federal and state regulations is a physical impossibility,' . . . , or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *California Federal Savings & Loan Ass'n*, 479 U.S. at 281 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963) and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

See also O'Brien v. *Consolidated Rail Corp.*, 972 F.2d 1, 3 (1st Cir. 1992).

These alternative avenues to preemption do not mean that either route is to be chosen lightly. The Supreme Court recently reiterated the longstanding principle that " 'the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [course is] the clear and manifest purpose of Congress.' " *Cipollone*, 112 S. Ct. at 2617 (quoting *Rice*, 331 U.S. at 230). Thus, the presumption is against preemption. *Id.* at 2618.

C. *Applying the Principles*

1. *State handicap discrimination statutes.*

Section 503 contains no express language regarding preemption. Our task, therefore, is to determine whether there are other indicia of Congressional intent to render state discrimination laws ineffectual against federal contractors. Exxon essentially makes a two-pronged argument. First, it cites legislative history suggesting that Congress sought a uniform federal remedy for violations of § 503, which would be frustrated if contractors additionally were subject to varying state laws. Thus, according to Exxon, Congress must have intended to preempt state provisions.

Second, Exxon suggests that the detailed nature of the administrative scheme promulgated under § 503 demonstrates Congress's intent to foreclose other types of remedies against federal contractors. Exxon maintains that, while Congress has not fully occupied the field of handicap discrimination, with respect to federal contractors, it has " 'left no room' for supplementary state regulation," *California Federal Savings & Loan Ass'n*, 479 U.S. at 281.

In our view, what Exxon offers as proof of an intent to preempt falls short of the mark. The legislative history on which the company relies is a single passage in

a Senate Committee Report relating to amendments to the Rehabilitation Act that were enacted a year after the Act itself. The amendments made no change in either sections 503 or 504 of the Act,[6] but the Senate Report commented:

> It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections.

S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373, 6391.

Exxon claims this passage demonstrates that Congress was seeking an exclusive approach to handicap discrimination by federal contractors, and that, consequently, it must have intended § 503 to displace parallel state laws governing the same conduct. Even without regard for the lesser weight accorded this subsequent history than would be accorded contemporaneous legislative comments, *see Heckler* v. *Turner*, 470 U.S. 184, 209 (1985), we believe Exxon has read far too much into the quoted remarks.

We are persuaded that the passage in no way implicates state law but instead reflects Congress's concern about the lack of coordination *on the federal level* between the two agencies responsible for implementing sections 503 and 504. The Senate Report continues from the portion quoted above to elaborate on the agencies' relationship:

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[6] Section 504, 29 U.S.C. § 794, prohibits discrimination against the handicapped in federally funded programs, the United States Postal Service, and in Executive agencies.

> The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504.

S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373, 6391. In our view, Congress was calling for a more uniform and consistent "*Federal* approach to discrimination against handicapped persons," *id.* (emphasis added); nothing in the passage indicates that it was seeking to eliminate any role for state law. *See D'Amato* v. *Wisconsin Gas Co.*, 760 F.2d 1474, 1482 (7th Cir. 1985) (by insisting on coordination, Congress was directing "that the two responsible agencies were not to work at cross purposes or to duplicate each other's efforts") (citation omitted).

Exxon's second basis for inferring an intent to pre-empt—the comprehensive and detailed regulations promulgated under § 503—is equally unavailing. The fact that Congress has implemented an extensive regulatory scheme in a particular area does not lead necessarily to the conclusion that it intended to displace parallel state remedies. As the Supreme Court stated in *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716-18 (1985):

> To infer pre-emption whenever [a federal agency] deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule . . . would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

See also R.J. Reynolds Tobacco Co. v. *Durham County*, 479 U.S. 130, 149 (1986) (preemption should not be inferred simply because federal agency's regulations are comprehensive). Exxon cites nothing in the state provisions that would make compliance with both state law and the detailed § 503 scheme a "physical impossibility," *Florida Avocado & Lime Growers*, 373 U.S. at 143, and, in the absence of other evidence of preemptive intent, there is no basis for displacing the state law.

In accepting Exxon's argument that Congress intended to preempt state anti-discrimination remedies against federal contractors, the district court relied entirely on the analysis of the Eleventh Circuit in *Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552 (1983). In *Howard*, the plaintiff had alleged a claim under Alabama law as a third party beneficiary of the § 503 affirmative action clause contained in contracts between his employer and the federal government.

The Eleventh Circuit rejected this claim. It held that state contract remedies could not be used to enforce § 503 essentially for the reasons Exxon has offered to us in support of its preemption argument. Emphasizing the Senate Report's reference to federal uniformity and the comprehensiveness of the § 503 administrative scheme, the *Howard* court found it "reasonable to infer that Congress left no room in section 503(b) for state contract actions to supplement it," *id.* at 1559. The court concluded that allowing the plaintiff to broaden enforcement of the affirmative action clause by means of state law could frustrate directly the specific scheme designed by Congress, allowing a private claim through the back door that couldn't come through the front door.

An inference of preemption was further warranted, the court held, because Congress's substantial interest in enforcing the affirmative action clause—determining appropriate terms, conditions and remedies—was "more substantial" than the state's interest in providing a remedy

for third party beneficiaries seeking to enforce the same clause. *Id.* at 1561.

We believe Exxon and the district court have relied unwisely on *Howard*, which differs from this case in a crucial respect. There, the plaintiff sought to use state law to enforce § 503 itself; the court ruled that Congress intended the federal administrative remedy to be the plaintiff's sole means of enforcing the affirmative action clause. Here, however, Ellenwood is seeking to enforce not § 503, but independent obligations created by state anti-discrimination statutes.

The claim in this case does not threaten the *uniformity* of the § 503 system. Rather, the issue here is one of *compatibility*, specifically, whether there is any basis for inferring that Congress believed an independent state remedy could not co-exist with the § 503 system. *Howard* is not helpful in this context. In the employment discrimination field, Congressional enactments "have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). *See also California Federal Savings & Loan*, 479 U.S. at 282-83; *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468-69 (1982); *Muncy* v. *Norfolk and Western Railway Co.*, 650 F. Supp. 641, 644 (S.D.W. Va. 1986) (ruling that § 503 does not preempt state human rights act). Nothing in § 503, which is focused narrowly on the contractual requirement for an affirmative action clause, provides a basis to infer a departure from that traditional approach.

In addition, several references in § 503's legislative history suggest that, rather than seeking to preempt state law through comprehensive legislation, Congressional leaders recognized that the federal statute was a modest one:

> "We are just beginning to do too little as the dimension of the problem grows in geometric proportion." Congressman Vanik, Congressional Record—

> House 18137 (June 5, 1973); "[W]e have only begun to scratch the surface in meeting the needs of our disabled fellow citizens." Congressman Brademus [sic], Congressional Record—House 30149 (September 18, 1973); "I do not consider [this bill] to be a perfect bill, or in all honesty, even an adequate bill." Senator Randolph, Congressional Record—Senate 34586 (July 18, 1973).[7]

Raytheon Co. v. *Fair Employment and Hous. Comm'n*, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1099 (Cal. Sup. Ct. 1988), *aff'd*, 212 Cal. App. 3d 1242, 261 Cal. Rptr. 197 (2d Dist. 1989).

A year later, in the Rehabilitation Act Amendments of 1974, Congress added a provision requiring state agencies that administer programs funded under the Act to take affirmative action to employ and advance qualified handicapped individuals who are covered under § 503. *See* Senate Report No. 1297, *reprinted in* 1974 U.S.C.C.A.N., at 6391-92. The Senate Committee Report noted that these agencies "are expected to adopt strong affirmative action programs which are *at least* equivalent to those now being developed for Federal agencies." *Id.* at 6392 (emphasis added). These comments, although referring to administering agencies rather than federal contractors, nevertheless suggest that Congress both acknowledged the role played by states in the area of handicap discrimination and assumed that states might choose to provide different—greater—protection than that afforded by the federal government. *See Raytheon*, 46 Fair Empl. Prac. Cas., at 1099.[8]

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[7] Both Congressman Brademas and Senator Randolph were among the managers of the legislation. *See* Conf. Rep. No. 500, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S.C.C.A.N. 2143, 2154.

[8] We acknowledge that this post-enactment legislative history is of less weight than contemporary commentary, but it is nevertheless of some significance. *See, e.g., Heckler*, 470 U.S. at 209; *Cannon* v. *University of Chicago*, 441 U.S. 677, 686-687, n.7 (1979).

Finally, we note that, in the recent Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, which amended the Rehabilitation Act and extended remedies for handicap discrimination against many more private employers, Congress stated explicitly that the legislation did not "limit the remedies, rights, and procedures of any . . . law of any State . . . or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b). While this provision obviously can have no effect on our view of Congressional intent in 1973, it is a particularly pertinent example of Congress's historical practice of allowing overlapping remedies for employment discrimination.[9]

Exxon attempts to distance this case from the tradition of overlapping remedies in two ways. First, it asserts that Congress has a unique interest in regulating federal contractors and, second, it claims that the area of handicap discrimination requires an extraordinary balancing of competing interests that distinguishes it from other types of employment discrimination, such as those involving race, gender or age. In the handicap discrimination field, Exxon maintains, the possibility of conflicting judgments is much greater because courts in different jurisdictions could reach widely disparate conclusions on such basic questions as what constitutes a "handicap" and which handicapped persons are "qualified" to hold particular positions. Restricting individuals to their § 503 remedy would ensure that a federal contractor doing business in more than one state would face uniform obligations nationwide.

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[9] The absence of a provision disclaiming preemption from the Rehabilitation Act of 1973 does not demonstrate, in the absence of other evidence, an intent to foreclose state remedies. Because of its far more comprehensive reach, the ADA is likely to have appeared more preemptive than the earlier legislation. Congress evidently made the sensible decision to avoid confusion by including an express provision.

We think it unlikely that Congress has a special interest in immunizing federal contractors from obligations otherwise applicable to them under state handicap discrimination statutes. These companies may do only $2,500 in business with the federal government, with the bulk of their enterprise devoted to commerce within a single state. This division gives the state a substantial interest in protecting the employment interests of its handicapped citizens. The developing nature of the issues raised in the field of handicap discrimination strikes us as insufficient justification for excusing these employers from obligations imposed on others who differ only in that the federal government is not one of their customers.

Moreover, Exxon's obligation is not simply to identify reasons why Congress might have departed from its usual practice, but to demonstrate a reasonable basis for inferring that Congress did, in fact, intend to make the federal remedy exclusive in this single area of employment discrimination law. Exxon has offered nothing from which we can discern such an intent.

In sum, we find no "clear and manifest" intent on the part of Congress to preempt state handicap discrimination claims against federal contractors. Indeed, we find no signals of such an intent.[10]

2. *Contract and promissory estoppel.*

In its appeal, Exxon contends that the district court should have extended its § 503 preemption ruling to Ellenwood's contract and promissory estoppel claims as well. Exxon points out that these claims allege that the company breached an agreement or promise not to discriminate on the basis of Ellenwood's "handicap" of alcohol abuse. Again relying solely on the uniformity ra-

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[10] Our preemption analysis applies as well to Ellenwood's claim for wrongful discharge based on public policy. We offer no view, however, as to whether such a claim exists under the applicable state law.

tionale, Exxon argues that all state claims based on the same assertedly discriminatory conduct are foreclosed by § 503.

Our ruling on the statutory claims also is dispositive here. We note, however, one instance in which a contract claim based on statements in a company policy manual may be preempted by § 503. Regulations promulgated under the statute require employers to post notices of their Rehabilitation Act obligations and of employee rights under § 503 in "conspicuous places." *See* 41 C.F.R. § 60-741.4(d). If an employer included such a notice in its policy manual solely to comply with this regulation, a state contract claim based on a breach of the manual provision arguably would be preempted by the federal law. *See Arellano* v. *Amax Coal Co.*, 56 Fair Empl. Prac. Cas. (BNA) 1519, 1524-25 (D. Wy. 1991). Such a claim, though in the guise of a contract claim based on the manual, would seem no different from one directly asserting a breach of § 503. A direct claim under § 503 unquestionably would be preempted for the reasons set out in *Howard*.

Exxon does not contend that the statements at issue here were required by § 503. Indeed, such a contention would be patently unsupportable. Ellenwood's contract and estoppel claims are not premised on a general notice of Exxon's affirmative action obligations toward handicapped individuals, but on a very specific written assurance from the company that it would not disadvantage employees for seeking treatment for alcoholism.

We therefore hold that the district court correctly determined that Ellenwood's contract and estoppel claims were not preempted by § 503.

II. *The Role of Admiralty Law*

Our conclusion that § 503 does not preempt Ellenwood's state statutory and common law claims does not end our inquiry into whether those claims are foreclosed by fed-

eral law. Exxon also contends that, even if § 503 does not preempt them, maritime law does. We consider this contention first as to the state statutes and second as to the contract and estoppel claims.

A. *State handicap discrimination statutes.*

In a brief footnote, the district court observed that, even if it had erred in its judgment about § 503 preemption, the state handicap discrimination claims nevertheless would be foreclosed because maritime law, rather than state law, governs all issues surrounding Ellenwood's employment as a chief engineer on board ship. The court stated that, "I am not aware of any basis under maritime law for such a recovery." Memorandum of Decision, Oct. 15, 1991, at 4 n.3.

The district court underestimated the role state law plays in maritime cases. Supreme Court cases make it clear that courts in admiralty cases may reach beyond maritime precedents and apply state laws "absent a clear conflict with the federal [maritime] law," *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). *See also Romero* v. *International Terminal Co.*, 358 U.S. 354, 373-75, 378, n.42 (1959); *Just* v. *Chambers*, 312 U.S. 383, 391 (1941); *Lyon* v. *Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); 1 S. Friedell, *Benedict on Admiralty* § 112, at 7-36 (7th ed. 1991); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (hereafter *Wright & Miller*) § 3672, at 441-444 (1985).

Exxon contends that this is a case of conflict. It asserts that applying state non-discrimination statutes in an admiralty case will contravene federal maritime law by undermining that "most fundamental and long established characteristic of maritime law: the need for 'harmony and uniformity' of that law." Exxon Brief at 21 (quoting *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). *See also Miles* v. *Apex Marine Corp.*, 111 S. Ct. 317, 322-23 (1990) (noting " 'the constitutionally

based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country'' '") (quoting *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 398 (1970) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875))); *Carey* v. *Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988).

Once again, however, Exxon heralds the need for uniformity without an appreciation for the boundaries of its relevance. All state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law. *See* 1 *Benedict on Admiralty* § 112, at 7-36. But when Congress established a separate admiralty jurisdiction and empowered the judiciary to develop substantive maritime principles for use nationwide, 14 *Wright & Miller* § 3671, it simultaneously assured that state law would continue to play some role in maritime affairs through the "saving to suitors" clause.[11] This provision allows plaintiffs to pursue, in addition to maritime relief, ordinary civil remedies provided by state law, so long as they do not conflict with the national substantive maritime law. *See* 14 Wright & Miller § 3672, at 440-444.

Through the years, the Supreme Court has confirmed that "[t]he State and Federal Governments jointly exert regulatory powers" in maritime matters, *Romero*, 358 U.S. at 374, and it is by now well established that state law is displaced only when it materially prejudices "the

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[11] The Judiciary Act of 1789 granted the federal trial courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," but also reserved to "suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *See Southern Pacific Co.*, 244 U.S. at 215-216. In its present form, *see* 28 U.S.C. § 1333(1), the clause gives the district courts original jurisdiction, "exclusive of the courts of the States," of: "Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled."

characteristic features of maritime law," 1 *Benedict on Admiralty* § 112, at 7-36. As we observed in *Carey*, "the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation.'" 864 F.2d at 207 (citation omitted). *See also Lyon* v. *Ranger III*, 858 F.2d at 27; G. Gilmore & C. Black, *The Law of Admiralty*, at 49-50 (2d ed. 1975). In other words, a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country; such claim is foreclosed only if the state law in question frustrates a fundamental tenet of admiralty law. *See Steelmet, Inc.* v. *Caribe Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986).

For example, in *Carey*, 864 F.2d at 207, we held that a Massachusetts rule barring tort recovery when a plaintiff is more than 50 percent negligent could not be applied in a maritime case because "[o]ne of the essential and longstanding features of substantive admiralty law is that contributory negligence can be considered only in mitigation of damages." The rule wholly foreclosing recovery is "'completely incompatible' with modern admiralty practice." *Id.* (quoting *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953)).

Although the rule barring state claims only if they directly conflict with basic maritime principles often requires "a delicate accommodation of federal and state interests," *Carey*, 864 F.2d at 207, we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint. Congress's only legislation in the area of handicapped rights has not been directed at maritime cases and, as discussed *supra*, its legislation did not preempt state remedies. We find no indications that the absence of substantive maritime law governing issues concerning individuals with handicaps reflects a federal interest in protecting maritime employers from such obligations.

See 1 *Benedict on Admiralty* § 112, at 7-37. To the contrary, the Rehabilitation Act's applicability to maritime employers demonstrates federal approval of such obligations.

Thus, the district court's observation that maritime law has not addressed handicap discrimination specifically is not a reason to dismiss the state claim but a basis upon which to give effect to the state provisions. Maritime law historically has appreciated the leading role of state statutes in creating additional bases of recovery. In maritime wrongful death cases, for example, remedies first were provided solely under state law. *See Miles*, 111 S. Ct. at 320-23; *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 397 (1970). When Congress enacted maritime wrongful death legislation in 1920, it provided remedies only where state law did not. *Miles*, 111 S. Ct. at 321; *Moragne*, 398 U.S. at 397-98. State statutes continued to play a primary role for another fifty years, until the Supreme Court created a general maritime cause of action for wrongful death. *See Miles*, 111 S. Ct. at 321-323; *Moragne*, 398 U.S. at 398-402.[12]

In its reply brief, the State of Maine notes a possible concern that strict state standards regarding employment of the handicapped would conflict with the maritime doctrine of seaworthiness. The State emphasizes, however, that under its law, any legitimate physical requirements for crew members under the seaworthiness doctrine would constitute bona fide occupational requirements that would provide a defense to claims brought under the statute. *See* 2A Me. Rev. Stat. Ann. tit. 5, § 4572(1) (Supp. 1992). Of course, whether or not a state's statute specifically included such a defensive pro-

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[12] Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine. *See Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 227 (1986).

vision, vessel owners obviously could not be held liable for damages under state anti-discrimination laws when federal maritime principles required the employer to make the contested employment decision. In that narrow way, maritime law would be preemptive.

As a general matter, however, we conclude that state human rights statutes may be applied in maritime cases. Indeed, it would be anomalous for maritime law, which has always shown "a special solicitude for the welfare of seamen and their families," *Miles*, 111 S. Ct. at 327, to reject such an employee-sensitive provision. *See also Smith* v. *Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A 1981) (noting "the admiralty court's protective attitude towards the seaman"). "'[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy.'" *Miles*, 111 S. Ct. at 327 (quoting *Moragne*, 398 U.S. at 387 (quoting Chief Justice Chase in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865))). *See also Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 6 n.1 (1st Cir. 1983) (state law "is generally referred to only when it affords greater protection to maritime employees than that afforded by admiralty law").

B. *Contract and promissory estoppel.*

Exxon contends that, in allowing the jury to consider Ellenwood's contract and estoppel claims, the district court improperly created an exception to the well-established rule that maritime employment is terminable at will by either party in the absence of a contract setting a specific term. According to Exxon, maritime law has "clung tenaciously" to the at-will principle, and only one narrow exception previously has been carved from it. In *Atlas Off-Shore Boat Serv.*, 653 F.2d at 1062-63, the court permitted a claim for wrongful discharge when a seaman was fired for filing a personal injury claim that he was entitled to file by statute. No additional excep-

tions should be allowed to erode the strength of the at-will doctrine, Exxon argues, since the seaman's rights as an employee already are well protected by federal statute. *See generally, e.g.*, 46 U.S.C. §§ 10302, 10303, 10313, 10502, 10504, 10505, 10506 (prescribing procedures governing meals, hours and wages for seamen).

Exxon misperceives the district court's ruling. The court did not devise a new "wrongful discharge" cause of action on behalf of Ellenwood. It simply recognized the obvious fact that—notwithstanding the general rule that a seaman's employment is at-will—a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees.

In this case, Ellenwood claimed that Exxon had promised that his job security and future opportunities would not be jeopardized if he sought treatment for alcoholism. The jury found that the requirements for establishing a binding obligation were met. We see no reason why maritime law would invalidate this self-imposed obligation.[13]

Accordingly, we affirm the district court's judgment on the breach of contract and estoppel claims. *See infra* Section V.

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[13] Exxon does not argue that the district court improperly instructed the jury on the elements necessary to establish a contract or promissory estoppel claim in these circumstances, and we therefore do not delve into this issue. *See, e.g., Pearson* v. *John Hancock Mutual Life Ins. Co.*, No. 92-1684, slip op. (1st Cir. Nov. 10, 1992) (discussing factors necessary to establish contract based on employee manual).

We do note that, as Exxon recognizes in its reply brief, a contract must be "reasonably certain" to be enforceable. *See Restatement (Second) of Contracts* § 33 (1981). An estoppel claim similarly must be supported by a sufficiently definite promise. *See Santoni* v. *Federal Deposit Ins. Corp.*, 677 F.2d 174, 178-79 (1st Cir. 1982). Exxon does not—and, in our view, cannot reasonably—argue that its policy statement assuring no adverse consequences based on alcoholism treatment is insufficiently definite to support a contract or estoppel claim.

III. *Negligent Infliction of Emotional Distress*

The jury awarded Theodore Ellenwood $50,000 and his wife $25,000 on their claims for negligent infliction of emotional distress. The district court overturned these verdicts on the ground that maritime plaintiffs may not recover for negligently caused emotional damages unless they demonstrate accompanying physical injury or impact.[14] The Ellenwoods presented no evidence of physical harm.

In granting judgment for defendants, the district court noted that the Supreme Court in *Atchison, Topeka and Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 568 (1987), had raised the possibility of recovery for purely emotional injury in cases such as this one.[15] The court recognized, however, that our circuit has had no opportunity since *Buell* to consider the issue. *See Moody* v. *Maine Cent. Ry. Co.*, 823 F.2d 693, 694 (1st Cir. 1987) (declining to consider physical injury requirement because plaintiff failed to show causation). It therefore relied on our decision in *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977), to hold that a physical injury is a prerequisite for recovery of emotional distress damages.[16]

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[14] The court very prudently allowed the claims to go to the jury, thus foreclosing the possibility of a later heavy investment of time and expense in the event that it should render a judgment notwithstanding the verdict and that we would disagree.

[15] *Buell* involved a claim brought under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, which creates a negligence cause of action for railroad workers against their employers. The Jones Act, 46 U.S.C. App. § 688, creates the same cause of action for seamen, and incorporates by reference the FELA. Case-law developed under both statutes guides subsequent interpretation of either of them. *See Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960); *Gaston* v. *Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989).

[16] Recovery for wholly emotional injuries was not at issue in *Bullard* because the plaintiff also had injured his foot. *See* 565 F.2d at 197 & n.3.

In the aftermath of *Buell*, recovery for wholly emotional injury under the Jones Act and FELA has become an "important and recurring issue" of federal law. *Ray* v. *Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White, J., dissenting from denial of certiorari).[17] The circuits vary in their treatment of such claims. *See, e.g., Ray* v. *Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991) (no recovery under FELA unless injury results from physical contact or threat of physical contact); *Taylor* v. *Burlington Northern R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir. 1986) (claims for wholly mental injury are cognizable); *Holliday* v. *Consolidated Rail Corp.*, 914 F.2d 421, 426-27 (3d Cir. 1990) (rejecting specific claim, but suggesting that, under the right circumstances, emotional distress damages may be recoverable); *Gaston* v. *Flowers Transp.*, 866 F.2d 816, 821 (5th Cir. 1989) (same).[18]

On appeal, plaintiffs urge us to hold explicitly that a seaman may recover emotional distress damages without showing a physical injury. Resolving this issue requires not only careful analysis of the specific facts of the case at hand, but also a review of common law jurisprudence and policy considerations. *Buell*, 480 U.S. at 568-70. As the Supreme Court noted in *Buell*, state court decisions reveal a number of "doctrinal divergences" concerning intentional and negligent infliction of emotional distress.

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[17] *Ray* was, in fact, an FELA case, but, as noted earlier, *see supra* note 15, FELA jurisprudence applies to Jones Act cases.

[18] In *Plaisance* v. *Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991), a divided panel of the Fifth Circuit announced a broad rule permitting recovery for negligently caused emotional injury, but denied recovery in the instant case because the accident was so unexceptional that the significant emotional injury sustained by a tugboat captain was not reasonably foreseeable. Subsequently, in an *en banc* ruling, the circuit affirmed the denial of recovery but withdrew the broad ruling of law. 966 F.2d 166 (1992). The Supreme Court denied certiorari. *See* 61 U.S.L.W. 3400 (U.S. Nov. 30, 1992).

Id. at 569-70. The Court therefore theorized that recovery for emotional injury "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.* at 568. It concluded its discussion by cautioning that, in this area of law, "broad pronouncements . . . may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570.

Because the Ellenwoods have failed to present their claims of negligence with particularity, this is not an appropriate case in which to undertake such a substantial inquiry. Counts VII and VIII of the complaint, in the words of the district court, alleged "intentional and negligent infliction of emotional distress on both Mr. and Mrs. Ellenwood in ending Ellenwood's career and disseminating confidential information concerning his conditon." Memorandum of Decision, Oct. 15, 1991, at 2. Neither the complaint nor the Ellenwoods' briefs, however, specifically identifies the negligent acts of commission or omission.[19] In closing argument, plaintiffs' counsel referred in one sentence, in conclusory terms, to the negligent infliction claim.[20]

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[19] For example, was the alleged breach of contract the asserted negligent action? Or was it the manner in which the new policy was devised? or communicated? or applied? Was the disclosure of Ted Ellenwood's alcohol treatment negligent? If so, how? Instead of specifically identifying the allegedly unreasonable conduct that constituted a breach of duty, plaintiffs apparently assumed that we could, and would, discern from the underlying facts one or more bases for their negligence claims. This approach dates back to plaintiffs' complaint, where they simply incorporated by reference the factual background underlying the other causes of action to support the negligence claims. *See* Complaint at ¶¶ 88-90.

[20] Following lengthy discussions of the contract, promissory estoppel and intentional infliction of emotional distress claims, counsel stated:

> I suggest to you that even if you don't find outrageousness [an element of the intentional infliction tort], you should still

The lack of attention devoted to this claim is further illustrated by plaintiffs' assertion that Ted Ellenwood's negligence cause of action was brought under general maritime law, not the Jones Act. *See, e.g.*, Tr. Vol. XII, at 7. In fact, the Jones Act provides the exclusive recovery in negligence for claims by seamen against their employers. *See Miles* v. *Apex Marine*, 111 S. Ct. 317, 324 (1990) (Jones Act was a response to *The Osceola*, 189 U.S. 158 (1903), which established that seamen could recover under general maritime law for injuries resulting from unseaworthiness but not negligence); *Beltia* v. *Sidney Torres Marine Transport, Inc.*, 701 F.2d 491, 493 (5th Cir. 1983) (Jones Act is "the sole basis upon which a seaman or his beneficiaries may sue his employer for negligence") (citation omitted). Ellenwood's general maritime cause of action could be dismissed for that reason alone.[21]

The Supreme Court in *Buell* only speculated that some claims for purely emotional injury may be brought under the FELA. *See Moody*, 823 F.2d at 694 (door to recovery

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return a verdict of negligent infliction of mental distress. I feel, however, very strongly that intentional infliction of emotional distress has been shown because of this policy itself and the actions Exxon Shipping Company took against him deliberately after this policy came into effect.

Tr. Vol. XI, at 98.

The court's instructions on the negligence count also were framed broadly. The court told the jury that the plaintiff must prove that (1) Exxon acted or failed to act as "a reasonably prudent corporation would act in the management of its affairs;" (2) that "severe emotional distress" to plaintiffs was foreseeable; and (3) that plaintiffs suffered such distress as a result of negligence. *See* Tr. Vol. XI, at 47.

[21] Although Mrs. Ellenwood's claim arises under general maritime law, the limitations on recovery contained in the Jones Act nonetheless are relevant because her claim is based on assertedly negligent conduct governed by the statute. *See generally Miles* v. *Apex Marine*, 111 S. Ct. at 327 ("We sail in occupied waters. Maritime tort law is now dominated by federal statute . . . .").

only "somewhat ajar"). Conducting the particularized review needed to evaluate such a claim here would require a detailed examination of Exxon's assertedly negligent conduct, its context, and its impact on the Ellenwoods. Arguably, even in a routine case, it would be inappropriate for us to construct a theory of negligence so that we could analyze a claim of apparently little importance to the plaintiffs. *A fortiori*, we would be ill-advised to do so here, where we are asked to take a precedential step with a highly circumscribed license from the Supreme Court.[22]

We decline to explore the frontiers of the negligent infliction tort in these circumstances. Accordingly, the district court's judgment vacating the Ellenwoods' damage awards is affirmed.[23]

IV. *Punitive Damages*

The Ellenwoods contend that the district court erred in refusing to submit their punitive damages claim to the jury. This argument faces a threshold barrier because the Ellenwoods have prevailed so far only on contractual

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[22] We note that the viability of emotional distress claims based on management policy decisions and other day-to-day interactions between employees and employers is a particularly sensitive matter. *See, e.g., Holliday* v. *Consolidated Rail Corp.*, 914 F.2d 421, 425, 427 (3d Cir. 1990); *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985); *Puthe* v. *Exxon Shipping Co.*, No. 89-CV-1619, 1992 U.S. Dist. LEXIS 14950, at *33-34 (E.D.N.Y. Sept. 26, 1992). Additionally, we question whether a case such as this, whose dominant claim is that the defendant intentionally reneged on a promise, presents the sort of tortious conduct properly compensable under the Jones Act.

[23] We find no merit in plaintiffs' assertions of error concerning their claims for intentional infliction of emotional distress. The instructions accurately reflected prevailing law, *see Restatement (Second) of Torts* § 46 cmt. d, and the court's evidentiary decisions fell well within its broad discretion, *see Harrison* v. *Sears, Roebuck and Co.*, No. 92-1055, slip op. at 6-7 (1st Cir. Dec. 9, 1992) (expert testimony); *Elgabri* v. *Lekas*, 964 F.2d 1255, 1261 (1st Cir. 1992) (Rule 403).

claims, which ordinarily do not support an award of punitive damages. *See Restatement (Second) of Contracts* § 355 (1981)[24]; *Thyssen, Inc.* v. *S.S. Fortune Star*, 777 F.2d 57, 62-63 (2d Cir. 1985). *See generally Molzof* v. *United States*, 112 S. Ct. 711, 715 (1992) (noting common law understanding that punitive damages were awarded "to punish defendants for *torts* committed with fraud, actual malice, violence, or oppression") (emphasis added).

Despite the general principle, the Ellenwoods contend that an award of punitive damages is permissible here because their claim involved breach of a non-contractual legal duty not to discriminate on the basis of a perceived handicap and, consequently, contractual limitations on damages are inapplicable. *See* Reply Brief at 22. They seek support from our decision upholding punitive damages for a shipowner's willful and callous withholding of a seaman's maintenance and cure in *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir. 1973). There, we emphasized the Supreme Court's statement in *Vaughan* v. *Atkinson*, 369 U.S. 527, 532 (1962), that "[m]aintenance and cure differs from rights normally classified as contractual" because "the duty to provide maintenance and cure 'is imposed by the law itself as one annexed to the employment.'" *Robinson*, 477 F.2d at 1052 (citation in *Vaughan* omitted).

This argument assumes that the Ellenwoods proved more than a breach of contract. They have not. In *Robinson*, punitive damages were permissible because the "'[t]he duty to provide maintenance and cure is in no real sense contractual, and a suit for failure to provide maintenance or cure can hardly be equated, therefore, with an action for breach of contract,'" 477 F.2d at 1052

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[24] This provision states:

> Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

n.3 (quoting *Vaughan*, 369 U.S. at 534 (Stewart, J., dissenting)). Ellenwood's proven breach of contract and promissory estoppel claims did not arise from a duty "imposed by the law itself," *Robinson*, 477 F.2d at 1052, but from Exxon's self-imposed obligation not to jeopardize the job security or future opportunities of employees who sought treatment for alcoholism. The Ellenwoods have cited no maritime decision awarding punitive damages for breach of this type of contractual obligation. *See Thyssen, Inc.*, 777 F.2d at 62 (no case found in which admiralty court awarded punitive damages for breach of contract).

We are aware of a recent trend to permit punitive damages in the contract setting in a narrow range of circumstances. *See* 5 A. Corbin, *Corbin on Contracts* § 1077 (1964 and Supp. 1992). This practice has been deemed appropriate when the breaching party acted with "[t]he state of mind which accompanies an intentional tort." *Id.* (Supp.) at 179. In this case, the jury found against the Ellenwoods on their intentional tort claims. Plaintiffs, however, maintain that this finding should not foreclose punitive damages because they claim that the standard for punitive damages under maritime law is less demanding than the standard for intentional infliction of emotional distress. *See Restatement (Second) of Torts* § 46; *Muratore* v. *M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988) (maritime standard). And so, plaintiffs contend that the rejection of their intentional tort claims is not fatal to an award of punitive damages.

Assuming that maritime law would permit a limited role for punitive damages in the contract setting—an issue we do not reach—we think it inconceivable that such damages would be available when the jury specifically has rejected plaintiffs' accompanying intentional tort claims. Thus, even if punitve damages may be awarded under martime *tort* law based on conduct that

would not satisfy the standard for intentional infliction of emotional distress, we decline to hold that they may be awarded for breach of *contract* in these circumstances.

Whether punitive damages may be available should Ellenwood prevail upon remand on the handicap discrimination claims is an issue not before us today. At the moment this is solely a contract case, and we adhere to the settled rule of law prohibiting such an award.

V. *Burden of Proof*

Exxon attempted to prove at trial that, even if Ellenwood had not been removed from his chief engineer's post in April 1989, he would have lost his job later in the year when Exxon downsized its fleet. Consequently, because Exxon continued to pay Ellenwood's full salary and benefits through January 1991, the company argued that Ellenwood was not entitled to any damages for breach of contract or promise.

On appeal, Exxon claims that the district court incorrectly instructed the jury that the company bore the burden of proving that Ellenwood would have been terminated for *bona fide* reasons unrelated to the new alcohol rehabilitation policy. The burden should have been placed on the plaintiff, Exxon asserts, and this error entitles the company, at a minimum, to a new trial on the contract and estoppel claims.

We find it unnecessary to consider this issue on the merits because we conclude that Exxon failed to preserve it. At two separate times, once before the jury charge and once after it, the court and counsel discussed the instruction on this defense. On the first occasion, during the precharge conference, the court announced its decision to impose the burden on the defendant to prove that Ellenwood would have lost his job for independent reasons, and twice repeated its intention to give such an instruction. *See* Tr. Vol. XI, at 24, 28, 29.

At that time, Exxon responded by asking the court to include, within the "independent reasons" portion of the jury charge, a sentence about "business judgment." This addition would have emphasized to the jury that, in considering whether Ellenwood would have been terminated as a result of the fleet's downsizing, it was not permitted to second-guess Exxon's business judgment in devising and applying its ranking system. *See* Tr. Vol. XI, at 26. The ensuing discussion focused on how to communicate to the jury that its task was limited to determining whether the ranking system was a pretext. The instruction ultimately adopted by the court included language suggested by Exxon's counsel. *Id.* at 29. At no time during this discussion did counsel object to the court's imposing the burden on Exxon.

Subsequently, the district court instructed the jury that "Exxon Shipping has the burden of proof to show you that Mr. Ellenwood would have lost his job for independent, nonpretextual reasons," *see* Tr. Vol. XI, at 51. Following the full charge on all claims, the district court held a sidebar conference in which it heard and responded to both sides' objections. At that time, Exxon's counsel requested an "additional instruction" on damages for breach of contract or promise.

The proposed addition consumes 43 lines in the trial transcript. *See* Tr. Vol. XI, at 64-66.[25] The first four paragraphs contained essentially the instruction on business judgment that Exxon had requested earlier. *See* Tr. Vol. XI, at 65 ("You may not consider whether in your opinion the evaluations or the rankings are appropriate or were done in a manner you agree with."). The next section opens with the assertion that "[t]he sole question you are to consider is whether Exxon Shipping maintained its employee ranking list in good faith," *id.*, and then states that, in deciding the question, "plaintiffs have the burden of proof." *Id.* The proposal goes on to elab-

[25] The requested instruction is reproduced in its entirety in an appendix to this opinion.

orate on the plaintiff's burden, i.e., to show "by a prepondenace of the evidence that Exxon Shipping manipulated or otherwise misused its ranking procedure in bad faith to cause Mr. Ellenwood to be ranked lower on the ranking list of chief engineers than he otherwise would have been." *Id.* at 65-66.

The district court gave the following response to Exxon's proposal:

> So far as the requested lengthy instruction . . . by the defendant involving rank, proximate cause, good faith, management practices and so on, I am satisfied that would involve me in too great a commentary on the evidence. Instead, I've given a general charge concerning the issue of whether Exxon would otherwise have terminated him, required only that its reasons be independent and not pretextual. I believe that that adequately meets the standards in this area.

Tr. Vol. XI, at 72. It appears that the district court focused primarily, if not exclusively, on the first portion of Exxon's lengthy request and concluded that its own pretext instruction adequately met Exxon's concern that the jury not consider how good the ranking system was but only whether it was used in good faith. Exxon made no further response and did not inform the court that it also was concerned about who had the burden on this issue.

What Exxon did here was not enough to entitle it to assert this issue on appeal as a basis for a new trial. Counsel did not object to the court's burden instruction, but proposed only an addition. The proposal was long and, in its latter portion, contradicted the court's earlier instruction on burden. When the court reacted with comments apparently directed only to the first part of the proposal, counsel made no effort to highlight its concern regarding the burden. This omission is particularly sig-

nificant in light of the earlier discussion, which focused solely on the busness judgment rule.

Similarly, in its post-trial memorandum seeking a new trial on the contract and estoppel claims, under the heading "Employee Rankings," Exxon argued only that the court erred "in declining to instruct the jury that it could not second guess the business judgment of Exxon Shipping with respect to its performance evaluations and employee ranking system." *See* Memorandum, at 9. Again, no reference was made to the burden of proof.

Not until its reply brief on appeal did Exxon articulate clearly and concisely its burden of proof objection. It is well established, the company now contends, that the burden of proving bad faith must be on the party seeking to show it because "[d]isproving bad faith is almost always close to impossible." Reply Brief, at 17. Because the issue here was not the quality of Exxon's ranking system, but whether the system was maintained in good faith, the company claims the burden should have been on Ellenwood to prove that Exxon manipulated its rankings in bad faith.

We do not reach this argument because it is too late. To consider disassembling the court and jury's substantial work without clearer notice than Exxon gave to the district court would be to snub the requirement in Fed. R. Civ. P. 51 that a party must "stat[e] distinctly the matter objected to and the grounds of objection." Accordingly, we leave undisturbed the district court's judgment on the contract and estoppel claims.

VI. *Benefits Offset*

Exxon has claimed error in the district court's instruction to the jury not to offset the damages award by the amount of special retirement benefits the company has paid or will pay to Ellenwood. Under a "special sea service plan," Exxon contributed to an annuity that distributed monthly payments to retired employees

in amounts based on life expectancy. Ellenwood began receiving annuity payments of nearly $20,000 a year following his retirement in 1991 at age 45. It is these payments that Exxon seeks to have offset.

Exxon's argument is based on the general principle that an award of lost earnings makes the wrongfully discharged employee whole and that to add pension benefits would give the employee a windfall. Ellenwood counters with his own windfall argument: subtracting the expected benefits from the damages award treats the employer who breaches an employment contract more charitably than one who has observed one faithfully. Both parties cite caselaw to support their claims.

In fact, however, we conclude that the record made in this case, rather than general principles, dictates the result. The relevant facts are contained in a letter from an Exxon official in response to a request from Ellenwood's counsel to provide "[t]he 1990 percentages of payroll for the various benefits provided to employees." Brief of Plaintiffs-Appellees at Addendum 18. The letter, which is not mentioned in Exxon's brief, itemized the percentages of payroll attributable to life insurance, medical and dental insurance, Medicare, a thrift plan, long term disability insurance, workers' compensation, and "all other." These items totalled 20.8% But included in the listing, indeed heading the list, was "Annuity" and its percentage, "(2.7%)". In other words, this percentage was deducted from the total of the above listed items, making the bottom line total percentage for fringe benefits 18.1%.

The effect of this listing was to indicate to Ellenwood's economic expert on damages that he should add to his computation of lost earnings 18.1% of those earnings to reflect compensation in the form of fringe benefits. Exxon did not add into the benefits total the 2.7% annuity item, which would amount to an annual payment of approximately $2,300. Indeed, the letter subtracted

the 2.7% from the remaining total of benefits, thereby reducing by a substantial amount the present discounted value of Ellenwood's fringe benefits.

Had there been no breach of the employment contract, the $2,300 yearly contribution apparently would have bought an annuity that, upon Ellenwood's retirement at age 65, would have yielded annual payments in an amount much larger than the present $20,000 amount. We look upon this amount as having been bought by prior Exxon contributions and earned by Ellenwood as part of Exxon's compensation package. To allow Exxon a further deduction for the income stream purchased by the annual $2,300 payment would seem to be, as Ellenwood argues, to allow a double credit.

This, at least, is how we read the testimony of plaintiff's economist, Dr. McCausland, who had asked for the percentages applicable to fringe benefits. He testified that

> the fringe benefit [sic] had to be put into present value terms . . ., it's how many dollars do we have to give him today so he'll have that amount of money available to him in each year to pay for the same fringe benefits.
>
> And I based it on their fringe benefit package . . . . And what I did, I took 18.1 percent of the present value of lost earnings, and that works out to be $294,528.79.

Tr. Vol. V, at 111. On cross examination Exxon's counsel asked, "Now you were also aware that Mr. Ellenwood is receiving almost $20,000 a year in pension benefits currently from Exxon Shipping Company?" To this, Ellenwood's counsel objected, saying, "that's his money, and it is not properly considered to be mitigation." Whereupon Exxon's counsel withdrew the question. *Id.* at 121-122.

On this record the district court ruled that it was "the burden of proof of the defendant to come forward and

show that these are benefits being received that should be subtracted from the amounts that plaintiff would otherwise . . . receive" and that "the state of the record doesn't permit that determination." Tr. Vol. XI, at 35. We agree. Indeed, it seems to us that the record is not merely insufficient to support a basis for offset, but points affirmatively to an already accomplished deduction.

VII. *Conclusion*

The following is a brief summary of our major holdings:

(1) we reverse the district court's ruling that state statutes prohibiting discrimination against the handicapped are preempted by the Rehabilitation Act of 1973 and maritime law, as well as its ruling that plaintiff's claim of violation of state public policy is similarly preempted, and the case therefore is remanded for further proceedings on such claims;

(2) we affirm the district court's ruling that Ellenwood's state contract and promissory estoppel claims are not preempted by either the Rehabilitation Act or maritime law;

(3) we decline to address the Ellenwoods' claim that the district court improperly granted Exxon's request for judgment as a matter of law on their claims for negligent infliction of emotional distress, concluding that these claims were not adequately developed;

(4) we affirm the district court's refusal to submit the issue of punitive damages to the jury;

(5) we find that Exxon failed to preserve its challenge to the district court's instruction imposing upon it the burden of demonstrating that Ellenwood would have been removed from his chief engineer's position in late 1989 for *bona fide* reasons independent of his participation in an alcohol rehabilitation program;

(6) and we affirm the district court's decision to exclude from the jury's damages calculation Ellenwood's sea service retirement benefits.[26]

The judgment of the district court is therefore affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs.

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[26] We have reviewed the district court's rulings on Ellenwood's privacy claims, and find no error.

APPENDIX

The following is the full text of Exxon's proposed additional instruction on damages for breach of contract or promise, as discussed *supra* at page 36.

> As you know, Mr. Ellenwood ceased receiving a salary from Exxon Shipping on January 15, 1991. If you find as Exxon Shipping claims that Mr. Ellenwood would have been terminated prior to that time in the fall of 1989 because of his low performance ranking compared to other chief engineers when Exxon Shipping's oceangoing fleet was downsized, then no damages should be awarded even if you find that Exxon Shipping breached a contract with Mr. Ellenwood.
>
> Under such circumstances, the conduct of Exxon Shipping complained of here was not the proximate cause of any loss Mr. Ellenwood suffered. If on the other hand you find that Mr. Ellenwood would not have been terminated when the fleet was downsized, you may continue to consider damages.
>
> During this case a number of witnesses have testified regarding Exxon Shipping's performance evaluation and ranking system. This case is not about whether you agree with or like Exxon Shipping's performance evaluation or ranking procedures, or whether you agree with or like Exxon Shipping's employment practices. As I previously instructed you, you may not substitute your judgment for the company's.
>
> I therefore instruct you that your views concerning whether Exxon Shipping's ranking system was well administered cannot be considered by you in rendering your decision in this case. You may not consider whether in your opinion the evaluations or the rankings are appropriate or were done in a manner you agree with.

The sole question you are to consider is whether Exxon Shipping maintained its employee ranking list in good faith. In deciding the question, plaintiffs have the burden of proof. By that I mean you must decide whether the plaintiffs have proven by a preponderance of the evidence that Exxon Shipping manipulated or otherwise misused its ranking procedure in bad faith to cause Mr. Ellenwood to be ranked lower on the ranking list of chief engineers than he otherwise would have been.

In essence, did Exxon Shipping make its evaluations of Mr. Ellenwood in bad faith with an intent to injure him in order to improve Exxon Shipping's defense in this case.

If you conclude that plaintiffs have not proven by a preponderance of the evidence that Exxon Shipping acted in bad faith in establishing its ranking list in 1989, then you must find that Mr. Ellenwood has suffered no damages under either of his contract claims.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 90-0086 P-C

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs

v.

EXXON SHIPPING COMPANY,
Defendant

MEMORANDUM OF DECISION

[Filed Oct. 15, 1991]

In April 1989 the defendant Exxon Shipping Company advised its employee Theodore Ellenwood that he was being removed from his position as Chief Engineer of the Exxon Wilmington, a 635-foot ocean-going oil tanker, because of an upcoming change in its employee drug and alcohol policy. On September 1, 1989, Exxon officially adopted the new policy, prohibiting persons with a history of substance abuse from holding what Exxon Shipping considers certain high risk positions. Exxon's earlier policy had assured employees that they would not be terminated or otherwise disciplined for seeking treatment for substance abuse, and under the earlier policy Ellenwood had sought alcohol abuse treatment and had notified Exxon accordingly. Ellenwood and his wife have now brought this lawsuit challenging Exxon's decision to remove him and Exxon has moved for summary judgment.

Ellenwood's complaint sets forth the following causes of action: breach of a contract based on Exxon's various

policies and letters (Count I); breach of a duty of good faith arising out of Exxon's use of confidential information concerning his alcohol treatment as a basis for removing him (Count II); estoppel arising out of Exxon's representations and promises (Count III); wrongful discharge in violation of the public policy promoting responsible treatment of alcoholism (Count IV); discrimination against the handicapped contrary to various state laws (Count V); misrepresentation over the career consequences of seeking alcohol treatment (Count VI); intentional and negligent infliction of emotional distress on both Mr. and Mrs. Ellenwood in ending Ellenwood's career and disseminating confidential information concerning his condition (Counts VII and VIII); defamation in removing Ellenwood from his position as chief engineer (Count IX); invasion of privacy in the manner in which Exxon obtained the information about Ellenwood's treatment and disclosed it (Count X); invasion of privacy in placing Ellenwood in a false light (Count XI); invasion of privacy in publicizing confidential information (Count XII); Mrs. Ellenwood's loss of consortium because of Exxon's conduct (Count XIII); and punitive damages (Count XIV).

1. *Preemption by Rehabilitation Act*

Exxon maintains that except for Counts X and XII charging it with obtaining and disclosing private information, Ellenwood's complaint based on state law is preempted by a federal statute prohibiting handicap discrimination, The Rehabilitation Act of 1973, 29 U.S.C. § 701-96. That statute, addressed in part to federal contractors such as Exxon,[1] has as its primary enforcement mechanism the

[1] The focus of the Rehabilitation Act is to end discrimination against qualified individuals with handicaps. Thus, section 503 requires that every contract between a contractor like Exxon and a federal agency that exceeds a certain dollar amount must "contain a provision requiring that, in employing persons to carry out such

Department of Labor's Office of Federal Contract Compliance Programs. *See* 41 C.F.R. § 60-741 *et seq.* (1991). Exxon argues, therefore, that any relief relating to handicap discrimination must come through that mechanism. In *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir. 1983), the Eleventh Circuit Court of Appeals found federal preemption, holding that § 503 preempts a qualified handicapped individual's state claim as a third-party beneficiary under an affirmative action clause entered into between his employer and the federal government.[2]

Unlike *Howard*, however, Ellenwood is not seeking relief under a federal contract or an affirmative action clause that Exxon entered into with the federal government. Except for Counts IV and V, Ellenwood is not even seeking relief under the state law protecting the handicapped. Instead, he is asserting conventional state law claims such as breach of contract, misrepresentation, defamation, infliction of emotional distress, etc. These claims are in no way related to the federal Rehabilitation Act, any affirmative action clause in a government contract, or handicap discrimination. I find no basis to conclude that, in enacting the Rehabilitation Act of 1973, Congress intended to eliminate ordinary state common law causes of action such as these. Under Exxon's reading, even if Exxon and Ellenwood had entered into a separate written agreement that Exxon would do nothing to Ellenwood on account of his alcohol treatment, Ellenwood would be unable to bring a lawsuit to enforce that contract because of the Rehabilitation Act. That is clear nonsense.

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contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps. . . ." 29 U.S.C. § 793(a).

[2] In *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1483-84 (7th Cir. 1985), the Seventh Circuit Court of Appeals held that, as a matter of federal law, an employee has no third-party beneficiary action under an affirmative action clause contained in a government contract.

Count V, on the other hand, is a direct claim of discriminaton on the basis of handicap under state law. Regulations enacted pursuant to § 503 of the Rehabilitation Act provide detailed and extensive procedures for dealing with handicap discrimination when it is practiced by federal government contractors. In *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), the Eleventh Circuit has set out in great detail the reasons why Congress' actions in this area amount to preemption of state remedies. I see no need to repeat the reasoning of the Eleventh Circuit here. Instead, finding it persuasive, I conclude that the state law count for handicap discrimination, Count V, is preempted by federal law.[3] Count IV seeks state common law relief for Ellenwood's discharge because it violates a public policy promoting responsible treatment of alcoholism. I conclude that any such public policy, if indeed such a policy has been recognized, is included within legislation prohibiting discrimination against the handicapped. Accordingly, it, too, is preempted by the federal statute.[4]

2. *Choice of Law*

Insofar as the plaintiff's causes of action involve his contract of hire, the applicable law is maritime law, not state law.[5] *Kossick v. United Fruit Co.*, 365 U.S. 731,

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[3] If this conclusion is unfounded, I would find for the reasons stated in text in Section 2, "Choice of Law," that maritime law should govern rather than state law. I am not aware of any basis under maritime law for a such a recovery.

[4] If it were not, once again the applicable law would be maritime rather than state law for the reasons set forth in Section 2 and I am not aware of any such policy in maritime law.

[5] Although the plaintiff argues in passing that, even if admiralty principles apply, the court should defer to local policy, it is apparent that this is the type of case that cries out for uniformity. Here, for example, a ship's engineer lives in Yarmouth, Maine, is employed by a company operating out of Texas and New Jersey, and when he is on his ship plies the coastal waters of the United States,

735 (1961) ("Without doubt a contract for hire either of a ship or of the sailors and officers to man her is within admiralty jurisdiction."); *cf. Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A Aug. 1981); *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 44 (5th Cir. 1970). The employment relationship here, as alleged in the complaint, involved Ellenwood's employment as a chief engineer on board ship. On this basis the following Counts are governed by maritime law:[6] Count I (breach of contract); Count II (breach of duty of good faith); Count III (estoppel); Count VI (misrepresentation); Counts VII and VIII (intentional and negligent infliction of emotional distress in discharging him); Count IX (defamation resutling from the discharge); Count X (invasion of privacy based upon Exxon's policies on alcohol treatment that allegedly induced Ellenwood to disclose confidential information to Exxon and Exxon subsequently violating its guarantee as to how it would use the information); Count XI (the false light charge assertedly arising out of the discharge). Count XIV requests punitive damages and depends upon the vitality of one or more of the other Counts. The remaining Counts are not maritime-related: specifically, Count XII (invasion of privacy based upon publication of confidential information) and Count XIII (loss of consortium of Ellenwood's wife).

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thus touching the jurisdiction of many states. Under these circumstances it is difficult to perceive how any single state has a peculiar interest in the contractual relationship. These are the kinds of considerations that led the Court in *Kossick v. United Fruit Co.*, 365 U.S. at 741-42, to conclude that local law should not apply but that a uniform maritime law should govern.

[6] The saving to suitors clause, 28 U.S.C. § 1333(1), does not help the plaintiff. It is solely a jurisdictional provision and does not give the plaintiff the right to determine whether his liability should be measured by common law instead of maritime law. *See Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372, 384 (1918).

3. *Breach of Contract and Estoppel*

With respect to Ellenwood's contract claim, I find that a genuine issue of material fact exists. Although Exxon has pointed to Ellenwood's deposition testimony that he had not been told that his employment was other than on an at-will basis and that he had no written employment contract, Ellenwood's affidavit states that Exxon provided him a written policy stating that job security and future opportunities would not be jeopardized for an employee who sought treatment for alcoholism. Moreover, to the extent that Ellenwood's claim depends upon oral representations, the general rule is that oral contracts are recognized by maritime law. *Kossick v. United Fruit Co.*, 365 U.S. at 734. I cannot, on this record, conclude that there was no contract for more than at-will employment or that the other claims related to Ellenwood's employment relationship with Exxon are foreclosed.[7] For the same reason, Count III, estoppel, survives. Moreover, Exxon has not satisfied me that no cause of action exists under maritime law for breach of a duty of good faith. Count II, therefore, also survives. I will want to see attention to this issue in the trial briefs.

4. *Fraud*

In Count VI Ellenwood claims that Exxon misrepresented to him in its earlier policy the consequences of engaging in alcohol treatment and disclosing the treatment to the company. Now that discovery has been completed, however, it appears that the only proof Ellenwood has of misrepresentation is the fact that in 1989, after the public clamor concerning safety on board ships arising out of the Valdez spill, Exxon abandoned its 1987 policy.

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[7] *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A Aug. 1981), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), *cert. denied*, 111 S. Ct. 2826 (1991), do not help Exxon because in neither case was there proof of the kinds of company statements the plaintiff is offering here.

I conclude that no juror could reasonably draw from that proof the inference that the policy promulgated 17 months earlier was accordingly frauduent at the time it was promulgated.[8] Even under Maine law, which the plaintiff prefers, misrepresentation requires the following elements to be proved:

> [A] defendant is liable for fraud or deceit if he (1) makes a false representation (2) of material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Jourdain v. Dineen, 527 A.2d 1304, 1307 (Me. 1987), *quoting Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979). Clearly, on this proof, a jury could not find that Exxon knowingly or recklessly made a false statement of material fact.

5. *Negligent and Intentional Infliction of Emotional Distress, Counts VII and VIII*

Contrary to the argument of Exxon, Dr. Evans' statement that the company is well-meaning and well-intended is not controlling on whether in fact the company acted in good faith in removing Ellenwood. It is not even clear that Dr. Evans' opinions concerning the motivations of Exxon are admissible. Exxon also contends that Ellenwood injured himself by initiating conversations with other crew members about his alcohol treatment. Who provoked the need to initiate those conversations,

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[8] The plaintiff also argues that Exxon's alleged disregard of the confidentiality aspects of its program is further evidence of its fraudulent intent. Even assuming that Exxon disregarded the confidentiality policy in 1988, I find that that sheds no light on the question whether Exxon had fraudulent intent when it adopted its original alcoholism policy.

however, is a question for the jury. Ellenwood asserts that he initiated those conversations only after other personnel had already been made aware of his treatment by Exxon. I conclude that there are jury issues on the question of whether Exxon's conduct was extreme and outrageous, whether it acted intentionally, recklessly or negligently, and whether Exxon's conduct injured the Ellenwoods.

Finally, at trial, the parties will need to be prepared to address whether maritime law recognizes such a cause of action as negligent or intentional infliction of emotional distress. Exxon argues at one point in its brief that these counts are governed by maritime law but it then does not apply maritime law any further than to conclude that Ellenwood has no claim for breach of contract. The rest of its attention is focused on the merits of Texas substantive law. Ellenwood, on the other hand, argues that Maine law applies. Consequently, the trial briefs will need to address this question under principles of maritime law.

6. *Defamation in Count IX and False Light in Count XI*

According to the complaint the sole basis of the plaintiff's defamation claim is the fact of his termination, demotion or reassignment depending upon what it is called. Ellenwood argues that that action by Exxon inherently communicated a defamatory statement about his capacities. I conclude, however, that, whatever jurisdiction's law is applied, a statement, oral or written, must be made. *Restatement (Second) of Torts* § 558 (1977) ("To create liability for defamation there must be: (a) a false and defamatory *statement* concerning another . . ." (emphasis added). On the plaintiff's reasoning, every unjustified demotion, termination or reassignment would inherently be defamatory. That is a perversion of the distinctions between wrongful discharge and defamation. Accordingly, the defendant's

motion for summary judgment on Count IX is *GRANTED*. I reach the same conclusion with respect to Ellenwood's asserted cause of action for invasion of privacy by placing him in a false light under Count XI. The only false light he asserts is Exxon's reassignment of him to a different position. As with defamation, I conclude that the mere act of an employer reassigning an employee does not alone create a cause of action.

7. *Privacy/Intrusion*

In Count X Ellenwood argues that Exxon invaded his privacy by setting up circumstances under which his wife would call the Company and notify it of his alcohol treatment and then later publicizing the information. Ellenwood attempts to distinguish this claim—a privacy action for intrusion—from Count XII where he claims a cause of action for improper publication of confidential information. I conclude that Exxon is entitled to summary judgment on Count X. There was no invasion of privacy in Mrs. Ellenwood's voluntary call to Exxon and no intrusion by Exxon in her choosing to make such a call. Whether the subsequent disclosure of the information was improper is a matter to be considered under Count XII. Pending further research, ruling is reserved on whether Count XII survives.

8. *Consortium and Punitive Damages*

Exxon's motion for summary judgment on these two Counts, XIII and XIV, is *DENIED*. Its argument for summary judgment on the consortium claim is that all other causes of action have disappeared. Since they have not, the consortium claim remains. The vitality of the punitive damages count will also have to await the outcome of the verdict on those counts that remain and I therefore do not grant summary judgment at this time.

9. *Conclusion*

Accordingly, Exxon's motion for summary judgment is *GRANTED* as to Counts IV, V, VI, IX, X and XI, and *DENIED* as to Counts I, II, III, VII, VIII, XIII and XIV. Ruling is reserved on Count XII.

Dated at Portland, Maine this 15th day of October, 1991.

/s/ D. Brock Hornby
D. BROCK HORNBY
United States District Judge

Supreme Court, U.S.
FILED
MAY 20 1993
OFFICE OF THE CLERK

No. 92-1589

In The

Supreme Court of the United States

October Term, 1992

EXXON SHIPPING COMPANY,

Petitioner,

v.

THEODORE M. ELLENWOOD and
ANN M. ELLENWOOD,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether maritime law preempts the application of a state fair employment handicap discrimination statute in an appropriate case.

2. Whether section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a), preempts the application of a state fair employment handicap discrimination statute against a federal contractor.

3. Whether maritime law recognizes a contract of employment between an employee and his employer under the facts of this case.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Theodore M. and Ann M. Ellenwood respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion and judgment of the Court of Appeals for the First Circuit, entered on January 14, 1993, and reported at 984 F.2d 1270 (1st Cir. 1993) (App. 1a-38a).[1]

OPINIONS BELOW

In addition to those opinions referenced by the Petitioner, another pertinent opinion is the United States District Court for the District of Maine's Memorandum and Order on Defendant's Motion for Judgment as a Matter of Law or For New Trial dated March 26, 1992, which is reproduced at 1a-15a.

STATUTES INVOLVED

The Savings to Suitors clause, 28 U.S.C. § 1333, provides, in relevant part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . .

STATEMENT OF THE CASE

A. Introduction

This case concerns a maritime employee who was fired from his job in the wake of the 1989 Exxon Valdez disaster solely because in 1988 he had sought treatment for what he believed to be alcoholism. Because petitioner's statement of

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[1] References to "App. ___" are to the pages of the Appendix included within the Petition for Writ of Certiorari. References to "___a" are to pages of the Appendix included within this Respondents' Brief in Opposition.

the case and the facts is significantly incomplete and inaccurate (and argumentative), respondents provide the following statement.

B. Background

On April 7, 1970, Exxon Shipping Company (or its predecessor) ("Exxon") hired Theodore M. Ellenwood ("Ellenwood") as a temporary employee to sail as a Third Assistant Engineer (Plaintiffs' Exhibit 57-A). The following year, recognizing that it might lose a talented and valuable employee, Exxon hired him permanently (Tr. Vol. I:91). Once it made him a regular employee, Exxon committed itself to only terminate Ellenwood's employment for just cause (Tr. Vol. I:93). Ellenwood quickly became a Chief Engineer, the highest ranking shipboard engineer and the top rung of Ellenwood's intended career ladder (Tr. Vol. I:92; Plaintiffs' Exhibit 57-E).

In the late 1970's and early 1980's, Exxon sought to rid itself of Ellenwood's union. Once Exxon accomplished this task, Mr. Schwartz, a senior official of Exxon, wrote Ellenwood a letter on behalf of the Company which expressly guaranteed that even without the union, Exxon would continue to respect their collective bargaining agreement as it applied to Ellenwood and that Ellenwood's working conditions would remain the same (Tr. Vol. I:94; II:21). Consequently, Ellenwood's employment continued to be terminable only for "just cause" as a matter of contract, and, as one would logically expect, he relied on his employer's letter and representations to this effect (Tr. Vol. I:94). Since sending Ellenwood the Schwartz letter, Exxon has never told him that he was employed on any basis other than a contract terminable for just cause and certainly never at will (Tr. Vol. I:94). Ellenwood and Exxon both expected, encouraged and planned for him to work until January 2011 (Tr. Vol. I:95). Thus, Ellenwood and Exxon had an express contract of employment for a specific limited duration terminable only for just cause. Amongst other evidence and arguments, Ellenwood contended

at trial and the jury could find from the evidence that Exxon's termination of his employment breached their contract.

In 1984, Exxon's Board of Directors adopted and formally published a policy on alcoholism (Plaintiffs' Exhibits 1, 11). This Directors' policy was a continuation of Exxon Corporation corporate policy established during the 1970's. Under the Board of Directors' policy, if an employee voluntarily sought alcohol rehabilitation, his "job security" and "future career opportunities" would never be "jeopardized" (Tr. Vol. I:108). Exxon testified that the "essence" of that policy from the 1970's continued beyond the time of Ellenwood's removal from his ship (April 13, 1989) (Tr. Vol. VI:128).

Thus, this Board of Directors' policy remained in effect during the time period relevant to this case. In 1988, when he entered alcohol rehabilitation at Mercy Hospital in Portland, Maine, Ellenwood "absolutely" believed this Directors' policy applied to him (Tr. Vol. I:108, 111, 112, 114). Ellenwood had many reasons for his sincerely held belief including, a) seeing other employees rely upon the policy and thus having their job security and career opportunities protected by it (Tr. Vol. I:108); b) being encouraged to rely on the policy as though it were "God's word" (Tr. Vol. I:108); c) being directed by Exxon to encourage other employees to take advantage of the policy in his role as an Exxon manager; d) there being no other Board of Directors' policy on the subject; and e) believing the Company's signed statements and commitments made to Ellenwood in their annual Business Ethics policy dealings (Tr. Vol. I:111).

At the relevant times, Exxon never replaced nor superseded the 1984 Board of Directors' Policy (Tr. Vol. V:169; I:109, 110, 112, 114). In fact, when Ellenwood worked temporarily in Exxon's headquarters during June and July 1989, the Board of Directors' Policy was openly and readily at employees' fingertips (Tr. Vol. I:108; VI:141).

In addition, Exxon management issued other letters and policies, none of which were communicated as coming from the Board of Directors and none of which were intended to modify, replace or displace the 1984 Board of Directors'

Policy (Tr. Vol. I:108-112). For example, in 1987, Exxon's President issued his own policy statement about substance abuse (Plaintiffs' Exhibit 2). Ellenwood learned about this statement during a twenty minute presentation to fleet officers (Tr. Vol. I:109-110, 114). After the two Human Resource Managers[2] read the letter, the attendees became very suspicious and began to make remarks (Tr. Vol. I:110). In response, the Managers stated: "this isn't intended to do anything, no one will get hurt. . . . (N)o one will get hurt as a result of this letter." (Tr. Vol. I:110).[3]

Exxon also proudly promulgated a very important Business Ethics policy signed by the President of the Company "to reemphasize Exxon's commitment to ethical and honorable conduct in all aspects of (its) business and the responsibilities of every individual to respect *the commitment.*" (Plaintiffs' Exhibit 9, 9A) (emphasis supplied). Every December, as a condition of employment, Exxon required Ellenwood (and all other employees) to sign an agreement to be bound by that policy (Tr. Vol. I:110).

When Ellenwood entered Mercy Hospital in March 1988, he expressly relied upon these various contracts, representations, letters, statements and policies that his job and career as Chief Engineer would not be jeopardized merely because he sought treatment for alcoholism (and so long as he was successful in his treatment (and that none of this would ever constitute just cause for taking his job and career from him)) (Tr. Vol. I:111, 112, 114, 120). Otherwise, he would have attended Mercy Hospital's 28 day treatment program at a time when it would not have interfered with his 60 day on – 60 day off work schedule and thus when Exxon would never have known about it (Tr. Vol. I:116).

Ellenwood's rehabilitation efforts were totally successful. In Exxon's own words, Ellenwood "made the contract

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[2] Including Daniel Paul, Exxon's Secretary (Tr. Vol. V:167).

[3] Even if it did apply, the jury easily could have found from the evidence that it gave Ellenwood contractual and estoppel rights which Exxon nonetheless violated in this case.

with the Company" and returned to work on May 2, 1988 (Tr. Vol. V:22).

At the relevant times,[4] Ellenwood sailed as one of two Chief Engineers aboard the Exxon Wilmington. The Wilmington sailed along the coast, between three ports in New Jersey and Baton Rouge, Louisiana (and not on the high seas despite petitioner's suggestion to that effect) (App. 42a, n.5). The Wilmington's performance won it many awards for 1988 (Plaintiffs' Exhibits 14, 18,66; Tr. Vol. V:151-152; XI:49-51).

On March 24, 1989, the Exxon Valdez crashed in Alaskan waters. The public began cutting up their Exxon credit cards (Tr. Vol. VIII:148). The *media* associated the crash with alcohol. Exxon had a public relations crisis on its hands. Ellenwood was aboard the Exxon Wilmington at the time of the Valdez crash (Tr. Vol. I:135).

On or about August 4, 1989, Human Resources Manager Paul officially notified Ellenwood that he would never again sail as an Exxon Chief Engineer (Plaintiffs' Exhibit 16).[5] Exxon's only reason was Ellenwood's *participation* in an alcohol rehabilitation program some seventeen months before (Tr. Vol. V:181-183).[6] Exxon's motivation was purely financial (Tr. Vol. V:170; VI:139; VII:148). Admittedly, the Company had no knowledge of the nature of Ellenwood's problem, only the fact that he had sought treatment. Also, it is undisputed that Ellenwood never had an issue with alcohol at or

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[4] 1988-1989.

[5] Recognizing its contractual obligation to him, Exxon admittedly considered and rejected exempting or grandfathering Ellenwood from its new policy. Exxon decided that it could not take this minuscule risk on the basis of business judgment (and nothing more specific nor articulable than that), even though, under Exxon's 1989 policy and U.S. Coast Guard regulations, Ellenwood would have been subject to periodic and random drug and alcohol testing (Tr. Vol. VI:145; V:178-180, 202-203). In addition, Exxon's decision had actually been made in April 1989 but the Company hedged and kept it from Ellenwood until the last possible moment (Tr. Vol. VI:133-135; V:183).

[6] Attending alcohol rehabilitation was not one of the just cause offenses posted on-board ship (Tr. Vol. VI:147). *Compare, Stetson v. S/V Sun Cloud*, 673 F. Supp. 1130, 1135-1136 (D. Mass. 1987).

near the workplace (Plaintiffs' Exhibit 5; Tr. Vol. IV:191). In fact, Exxon's nationally acclaimed expert opined that Ellenwood has never been an alcoholic (Tr. Vol. V:133). Nor did he find any evidence that Ellenwood had a substance abuse problem as defined in Exxon's September 1, 1989 policy (Tr. Vol. V:135).

Ellenwood filed Rehabilitation Act charges with the Office of Federal Contract Compliance Programs in September 1989 (Tr. Vol. VI:106-107). This suit, alleging unrelated causes of action, followed in March 1990. Contrary to what Exxon tells the Court, the lawsuit was not filed simultaneously with the OFCCP complaint.

Exxon breached its contract with Ellenwood based upon what *it* termed a change in company policy. The "policy" disqualified for life any employee who had ever (even 40 years ago) been *treated* for alcoholism from sailing as a Chief Engineer (Tr. Vol. II:60; V:179). To be affected, the employee did not have to have ever been an alcoholic, it only mattered that the employee sought treatment for alcoholism at some point in his life (Tr. Vol. VII:190; V:181).[7] It also did not matter what contractual arrangements existed between Exxon and the employee. Exxon knew it would be challenged in legal proceedings and calculated that it would take this risk (Tr. Vol. III:77; V:200; VI:150-151). Also, to the extent it is even relevant, while the policy pegged the Chief Engineer as a "designated" safety sensitive position, Exxon never proved why the position was safety sensitive nor that the positions were narrowly defined, and, furthermore, the jury was free to disregard any such evidence (Tr. Vol. IV:93; V:171, 175-180). Notably, the Wilmington's engine room can run *itself* for

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[7] Furthermore, this draconian policy *required* employees to disclose in writing whether they had ever attended an Alcoholics *Anonymous* meeting (Tr. Vol. III:174, 182; VIII:190, 191; Defendant's Exhibit 66). The policy states that if one has *ever* attended such a meeting, he is deemed to have a problem with alcohol, by definition.

fifteen hours per day (Tr. Vol. IV:142). Moreover, Exxon's policy actions were not required by U.S. Coast Guard regulations or other law (Tr. Vol. II:79; V:182).[8]

The irony of this "policy" change is that it was really aimed just at Ellenwood. Of Exxon's six hundred Gulf Coast fleet employees, Ellenwood was the only one impacted (Tr. Vol. V:153; IX:9). There were four others elsewhere in the Company, however it is unknown whether any had the same employment contract as Ellenwood (Tr. Vol. V:180).

Finally, contrary to Exxon's fatuous suggestion in its petition, Ellenwood was not "reassigned;" rather, at the eleventh hour, Exxon offered him two demotions intended to humiliate him and force him out of the company. Plaintiffs proved and the jury clearly found these offers to be demotions.

At trial, Exxon claimed to have searched the world, considering more than 20,000 positions as possible alternative jobs for Ellenwood (Tr. Vol. V:193-196). Despite its worldwide search, Exxon only made the first offer in November 1990, some nineteen months after removing him from his Chief Engineer's job (and during the pendency of this lawsuit) (Joint Exhibit 53). Exxon offered to demote Ellenwood to First Assistant Engineer, a position which Exxon admitted was the next best job (to Chief Engineer) for which Ellenwood was qualified (Tr. Vol. II:82-83; V:196). Exxon's offer was based upon a previously required contingency that Ellenwood pass a psychiatric examination (which he did the previous summer) (Tr. Vol. II:75). Also, even the demotion had limits on it. As Chief Engineer was a "designated" position, had Ellenwood agreed to accept this demotion, Exxon refused

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[8] This whole charade was a public relations ploy. The Company realized that the Valdez crash was not caused by the alleged use of alcohol (Tr. Vol. V:170; VI:138-139; X:171). The Court should take judicial notice that the Company's position in pleadings subject to *Fed. R. Civ. P.* 11 has been that the crash was caused by a defective navigational device. *See, Exxon Corporation and Exxon Shipping Company v. Sperry Marine, Inc.*, No. A91-526 Civ. (D. Alaska filed October 29, 1991).

in perpetuity to consider promoting Ellenwood to Chief Engineer or even to let him serve as Chief in a temporary, step-up capacity (Tr. Vol. V:197). Also, Ellenwood believed that he would have to abandon this lawsuit in order to accept either this or the following demotion (Tr. Vol. II:173, 175; III:54).

The second, more drastic demotion was to Encon Engineer, a position which Ellenwood was responsible for creating when he worked as an Exxon Port Engineer (Tr. Vol. II:85; IX:47). This position was just a glorified data entry clerk's position in a "career graveyard" (Tr. Vol. II:85-86, 180; III:54-55). Furthermore, the job was a lower-paying desk job without a five year salary guarantee (Joint Exhibit 53; Tr. Vol. II:85; V:197-199). Also, Ellenwood's career was at sea which is where his superior, Fleet Manager Koops, found him best suited to work before any of this happened (Tr. Vol. IX:42). Plaintiffs proved and the jury clearly found both positions to be demotions for these and many other reasons (Tr. Vol. VI:132).

C. The District Court Decisions

The district court submitted Ellenwood's breach of contract and estoppel claims to the jury which considered the evidence and returned a verdict in Ellenwood's favor. The evidence was such however that neither claim was necessarily based upon Exxon's 1987 policy statement. Exxon's biased statement to that effect is purely editorial. Further, the district court labeled Exxon's argument that the Rehabilitation Act preempted Ellenwood's contract claim as "clear nonsense" (App. 41a.). In its post-trial rulings, the district court again had an opportunity to address and reject these contract arguments (11a-12a).

D. The First Circuit Decision

1. Lack of Maritime Preemption

The First Circuit appropriately held that courts may apply state employment discrimination statutes in appropriate maritime cases. The First Circuit followed the decisions of

this Court in holding that "courts in admiralty cases may reach beyond maritime precedents and apply state laws 'absent a clear conflict with the federal [maritime] law,' " (App. 16a) *quoting, Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). The First Circuit went on to state:

> we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint. . . . We find no indications that the absence of substantive maritime law governing issues concerning individuals with handicaps reflects a federal interest in protecting maritime employers from such obligations. (App. 18a).

2. Lack of Rehabilitation Act Preemption

The First Circuit engaged in a substantial and detailed analysis of Exxon's argument that section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, preempts Ellenwood's state law handicap discrimination claim and concluded that Exxon's argument is patently baseless (App. 4a-14a). The First Circuit thoroughly distinguished *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983) which was a case of limited holding and which addressed the use of state law to circumvent section 503's lack of a private cause of action.

3. Maritime Employment Contract

Calling it an "obvious fact", the First Circuit agreed with the district court that "a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees . . . " and that "(t)he jury found that the requirements for establishing a binding obligation were met." (App. 21a). The First Circuit went on and merely held that Exxon cannot avoid this "self imposed-obligation." *Id.* To the extent it is relevant, the jury did not necessarily even base its conclusion on the policy statement upon which Exxon has selectively focused. In fact, as described *supra,* the jury heard a great deal of evidence upon which it could have based its

verdict without even considering Exxon's chosen "policy" statement. Exxon's real complaint is that the jury refused to credit its evidence and arguments over respondents'. Furthermore, this decision is not a "departure" from the employment at will doctrine, which, contrary to Exxon's assertion, is not a "long-established maritime principle . . . " and clearly has nothing to do with this case (Petition, p. 8).

E. Further Proceedings

Exxon filed a Petition for Rehearing and Suggestion for Rehearing En Banc on January 28, 1993. The First Circuit denied Exxon's request on February 23, 1993.

REASONS FOR DENYING THE WRIT

The following reasons justify why the Court should deny Exxon's petition for a writ of certiorari.

First, the Court has already held that state and federal governments may jointly regulate issues that are both maritime and local. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325; *Just v. Chambers*, 312 U.S. 383 (1941). Furthermore, the Court has held that states do have a strong local interest in prohibiting employment discrimination and therefore, federal preemption is not warranted. *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963). There is no need for this Court to formulate a new maritime rule that shields employers involved in admiralty from complying with those state anti-discrimination laws which appropriately apply to their conduct under traditional and time honored choice of law concepts.

Second, no conflict exists between this case and the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc., supra.* The two cases address unrelated and entirely different subjects. This case in fact has nothing to do with the Rehabilitation Act or its enforcement. Moreover in the realm of employment discrimination statutes, remedies overlap and do not preempt each other. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). No evidence exists that Congress

intended to insulate those employers fortuitous enough to hold a federal contract of $2,500 or more from unrelated obligations under state handicap discrimination law.

Third, the contract claim is fact intensive and hardly raises an important question of federal law sufficient to trigger this Court's review. The overwhelming evidence clearly demonstrates that Exxon and Ellenwood entered into a binding agreement which Exxon breached in the wake of the Valdez. As does every jurisdiction in this country, maritime law recognizes and enforces employment contracts such as the one which the jury found from the facts in this case. *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961). Finally, this is not an employment at will case and Exxon's argument about a broad impact on the maritime industry is wholly imaginary.

I. THE COURT DOES NOT NEED TO CREATE A NEW MARITIME RULE EXCLUDING MARITIME EMPLOYERS FROM COMPLIANCE WITH APPROPRIATE STATE DISCRIMINATION STATUTES.

The First Circuit's recognition of Ellenwood's right to pursue a claim based on state discrimination statutes is consistent with the precedent of the Court. The review of the First Circuit's decision by this Court is therefore not needed. Exxon essentially argues that this Court should fashion a new admiralty rule prohibiting a state government from protecting its citizens from employment discrimination. Exxon claims that such a maritime rule is needed to protect the uniformity of maritime law. Exxon's Petition is in reality a request that this Court extend admiralty's interest in uniformity leagues beyond that established by its precedents.

The Court has long recognized that states play a significant role in jointly regulating matters that have both a local interest and also impact maritime issues. In *Just v. Chambers*, the Court stated:

> it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject.

Id., 312 U.S. at 387, 388. Subsequently, in *Romero v. International Operating Terminal Co.*, 358 U.S. 354 (1959), the Court reiterated that:

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. . . . Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Id., 358 U.S. at 373, 374. In *Askew v. American Waterways Operators, Inc.*, the Court once again reaffirmed that both state and federal governments may regulate matters that impact maritime law.

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of the extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . . Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

Id., 411 U.S. at 341. The power to eradicate American workplaces of employment discrimination has traditionally been within the competence of the states. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282-83 (1987).

In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314-16 (1955), the Court succinctly set out the criteria used to evaluate whether maritime law preempts a state or local law. The first step is to determine whether the state or local law conflicts with any federal statute. If there is no conflict, then the Court must determine if there is "a judicially established federal admiralty rule governing" this issue and if there is no rule, then whether the Court should fashion one. *Id.*

State employment discrimination statutes do not conflict with any federal statute nor with any admiralty rule. Moreover, there is no pressing need for this Court to establish a

new admiralty rule that will exclude the states from prohibiting employment discrimination.

Exxon cites *Kossick v. United Fruit Co.*, 365 U.S. 731, to support its contention that the federal interest in a uniform set of laws for maritime law dominates to the exclusion of the local interests of the individual states in this matter. Exxon's citation to this case to support its contention that states are not able to prohibit employment discrimination when such discrimination touches maritime interests is far-fetched and off the mark; moreover, the *Kossick* Court's decision actually resolved the extent to which states may regulate employment related issues when they impact maritime interests. Thus, the issues which Exxon has presented in its petition are not issues which this Court needs to address again.

In *Kossick v. United Fruit Co.*, the Court held that New York's statute of frauds was preempted by maritime law. However, the Court held that the statute of frauds was preempted only because maritime law had a contradictory principle addressing that particular issue. In the case at hand, no such contradictory maritime law principle exists.

Furthermore, the *Kossick* Court pointed to several considerations that led it to favor preemption of New York's Statute of Frauds. The first consideration was that the dispute involved the enforcement of a contract "and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government." *Id.*, 365 U.S. at 741.

Second, the *Kossick* Court found that the contract under review was not "peculiarly a matter of state and local concern," *Id., quoting, Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960). Finally, the *Kossick* Court held that the application of New York law would result in the invalidation of a contract recognized in admiralty and would therefore be more than just a supplementation of rights available in admiralty. In fact, application of New York law would deny otherwise available rights to a maritime employee.

In response to the *Kossick* Court's first consideration, Ellenwood's state discrimination claims do not involve[9] the enforcement of a maritime contract. Rather, this Court is dealing with state regulations prohibiting employment discrimination. This favors application of state employment anti-discrimination law. *Kossick*, 365 U.S. at 741.[10]

The states also have a strong local concern in prohibiting discrimination in employment and Congress has explicitly recognized this local concern. *Guerra*, 479 U.S. at 282-283. In passing the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("A.D.A."), Congress made it clear that nothing in that Act should invalidate or limit in any way any state law that provides remedies, rights and procedures that allow greater or equal protection to individuals with disabilities. 42 U.S.C. § 12202(b). Thus, Congress has recognized that states do indeed have a strong local interest in protecting the rights of individuals with disabilities or those who are perceived to have disabilities. *Cf., English v. General Electric Company*, 496 U.S. 72, 110 S. Ct. 2270, 2279-81 (1990).

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[9] Although Ellenwood has asserted a claim under the discrimination statutes of Maine, New Jersey and Texas, the parties recognize that only the statute of one of the three states will apply in this case. The selection of the appropriate state will be resolved by the choice of law rules articulated in *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941) (holding that the state whose law will apply is the state whose laws would govern according to the valid choice of law rules of the forum state). Thus, Exxon need not worry about the application of the laws of the 50 states but only with the laws of those states where *Exxon chooses to do* enough business such that Exxon can fairly and equitably be held to be answerable to those states' laws. This standard is no different than those applied to any other multi-state corporation.

[10] Furthermore, Exxon's reliance on the dicta found in *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E. 2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989), for the proposition that the state discrimination laws in the case at hand will intrude on the maritime doctrine of seaworthiness is also misplaced. By the admission of Exxon's expert, the issue in this case is a perceived disability rather than an actual disability (Tr. Vol. V:133). A perceived disability by definition cannot implicate seaworthiness and thus, petitioner's argument has no applicability to this case. *Cf., Continental Airlines*, 372 U.S. at 722.

The Court has also recognized the strong local nature of the states' interest in prohibiting employment discrimination. For example, in *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963), the Court considered whether Colorado's requirement that employers refrain from racial discrimination unduly interfered with interstate commerce and specifically with the supposed need of an airline to be subjected to only federal anti-discrimination laws. In that decision the Court stated:

> Not only is the hiring within a State of an employee, even for an interstate job, a much more localized matter than the transporting of passengers from State to State but more significantly the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent.
>
> . . .
>
> It is, of course, possible that States could impose such onerous, harassing, and conflicting conditions on an interstate carrier's hiring of employees that the burden would hamper the carrier's satisfactory performance of its functions. But that is not this case.

Id., 372 U.S. at 722. Likewise, the state regulations which would apply in this case do not "burden" petitioner to such an extent that it cannot satisfactorily perform its functions. First, there is no conflict in the manner the various state discrimination laws treat those perceived to be recovered alcoholics. Second, Exxon complains that it should only be burdened with complying with the Rehabilitation Act of 1973 (and now the A.D.A.) (which incorporates state law) and no more. To require more, Exxon complains, would unduly jeopardize the uniformity of maritime law. This reasoning does not hold up under closer scrutiny. In interpreting Section 503, and now the A.D.A., state law has been consistently relied upon in order to determine the extent of an employer's obligations under the federal laws. *See, e.g., Department of Labor v. Texas Industries, Inc.*, 47 F.E.P. Cases (BNA) 18, 27 (Dept. of Labor 1988), *citing, Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335 (Me. 1986). Since state handicap discrimination

laws already play a large role in determining the extent of Exxon's obligations under Section 503, the requirement that Exxon comply with certain state discrimination laws places no heavier a burden on it than it already faces under federal law. Therefore, state discrimination laws do not place "onerous, harassing and conflicting conditions" on Exxon and therefore do not unduly impact the "harmonious and uniform" characteristic of admiralty to which Exxon clings so dearly. *Colorado Anti-Discrimination Commission*, 372 U.S. at 722.

Finally, unlike in *Kossick* (where the Court found that the validation of oral contracts is peculiar to admiralty law), there is no rule regarding discrimination peculiar to admiralty that would warrant the invalidation of state discrimination laws as they apply to Exxon. In the employment law context, "maritime rights" have traditionally been supplemented with those provided by the states. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980). In holding that states may apply their workers' compensation laws to land based injuries that also fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* the Court stated:

> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits.

Id., 447 U.S. at 724. Like in the *Sun Ship, Inc.* case, the state discrimination law in the case at bar supplements maritime law; it does not supplant it nor is it engrafted onto maritime law as asserted by Exxon.

Exxon cites the Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) to support its argument that admiralty's interest in uniformity is of central importance. However, the Court has steadily narrowed the application of its holding in that case over the years and now is primarily concerned with whether state regulation conflicts

with federal law in maritime areas and those unusual instances in which uniformity is required. *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 341 (1973).

Exxon's reliance on *Belanger v. Keydril Co.*, 596 F. Supp. 823, 825-826 (E.D. La. 1984), *aff'd.*, 772 F.2d 902 (5th Cir. 1985) in support of its position that the Fifth Circuit declined to enforce a state discrimination claim is misplaced and is a misrepresentation of the holding in that case. In *Belanger*, the plaintiff brought an age discrimination action against his former employer. The plaintiff's suit was brought under the Federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the General Maritime Law and the Louisiana Age Discrimination in Employment Act. La.R.S. 23:97176. At the time of the plaintiff's discharge he was working on a drilling rig off the coast of the Republic of Zaire. The United States District Court for the Eastern District of Louisiana found that the ADEA did not apply to the plaintiff since the ADEA does not apply to American Nationals employed outside the United States by American employers. *Belanger*, 596 F. Supp. at 824. Next, the district court found that general maritime law does not provide a common law cause of action for age discrimination. However, most importantly, the district court did find that the employer was subject to Louisiana's state discrimination law.[11] Thus, *Belanger v. Keydril* is consistent with the First Circuit's decision here.

Furthermore, Exxon's claim that it might be subjected to fifty state discrimination statutes depending on the residency of its seamen does not hold water. Exxon, like every other employer, is only subject to the discrimination laws of the state whose laws would govern according to the valid conflict of laws rules of the forum state. *Day and Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975); *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941). Maine applies the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 6

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[11] The plaintiff's state age discrimination claim was tried to a jury. The jury ultimately found that the plaintiff's termination was not related to his age.

(1971) in which the protection of justified expectations of parties is a consideration in choosing which state's law will apply. *Mason v. Southern New England Conference Ass'n of Seventh Day Adventists of Town of South Lancaster*, 696 F.2d 135, 137 (1st Cir. 1982). Unless Exxon has a valid connection to a particular state it will not be subject to that state's discrimination statutes. Exxon's suggestion that it might be automatically subjected to fifty different statutes is a wild exaggeration. Like any other multi-state corporation, Exxon need only be concerned with the application of those states' laws where the equities of a given dispute justify their application.

Exxon has ignored that states are accorded the explicit right to play a part in maritime matters. 28 U.S.C. § 1331(1). It has also ignored the admiralty court's tradition of extending protection to seamen when possible. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy." (App. 20A), *quoting, Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 327 (1990), *quoting, Moragne*, 398 U.S. at 387.

State and federal governments have long shared regulation of employment discrimination. Contrary to petitioner's assertions, no dominant federal interest is at stake that merits review by this Court. Accordingly, the Court should reject Exxon's petition.

II. ABSOLUTELY NO CONFLICT EXISTS BETWEEN DECISIONS OF THE FIRST AND ELEVENTH CIRCUITS AND THUS, THE PETITION SHOULD BE DENIED.

Petitioner asks the Court to grant a writ of certiorari to reverse the First Circuit's decision that section 503 of the Rehabilitation Act does not preempt state statutory handicap discrimination claims. In a ploy to grab the Court's attention, Exxon unabashedly claims a "sharp conflict" exists between the First Circuit's opinion in this case and the Eleventh Circuit's opinion in *Howard v. Uniroyal, Inc.*, wherein that

court, in what it described as a quite limited holding, declared that a state common law contract action could not be used to enforce section 503 (which itself allows for no private cause of action). *Howard,* 719 F.2d at 1558, 1561-62. The First Circuit, on the other hand, considered whether the Rehabilitation Act preempted state handicap discrimination statutes, and for that matter, whether the mere fortuity of holding a $2,500 federal government contract meant that the employer/contractor was thus exempt from the application of otherwise applicable state employment discrimination statutes. After a lengthy and well reasoned analysis, the First Circuit could reach but one conclusion: Congress never intended the Rehabilitation Act to preempt state statutory handicap discrimination claims against employers which happen to hold a federal contract.

Petitioner tells this Court that its "sharp conflict" relates to a finding of Congressional intent for uniformity. However, Exxon's uniformity argument actually relates to how one enforces "the affirmative action clause contained in the contract between his employer and the federal government." *Howard,* 719 F.2d at 1562. That issue has absolutely nothing to do with this case as Ellenwood did not sue to enforce section 503 (App. 11a). Moreover, despite what Exxon tells the Court, the First Circuit never drew a distinction between statutory and common law claims, rather the First Circuit drew a distinction between (1) claims seeking to enforce section 503 through channels other than those created by Congress under the Rehabilitation Act, and (2) claims seeking to enforce rights which co-exist with and are totally independent of the Rehabilitation Act.

Along these lines, the Eleventh Circuit was quite careful to denote the very limited scope of its holding in *Howard.*

> We find this interest *in enforcing the affirmative action clause,* expressed in section 503(b) and its implementing regulations, to be more substantial than that of the state in providing a remedy *in this limited class of third party beneficiary actions to enforce the same affirmative action clause.*

. . .

> We merely hold that *in this case* the remedy provided in precise detail by Congress in enacting section 503(b) was intended to be the plaintiff's *sole means of enforcing the affirmative action clause contained in the contract between his employer and the federal government.*

Howard, 719 F.2d at 1561-62 (emphasis supplied). The basis for the holding was that the Rehabilitation Act already provided a remedy for a breach of Section 503. *Howard*, 719 F.2d at 1561; *Muncy v. Norfolk and Western Railway Company*, 650 F. Supp. 641, 644 (S.D. W. Va. 1986); App. 10a. The Eleventh Circuit never considered the enforceability of state law rights which are unrelated to the Rehabilitation Act. Rather, the entire opinion focuses on whether state law could be used in a third party beneficiary mode to enforce section 503 of the Rehabilitation Act.

As noted above, federal employment discrimination laws overlap, rather than preempt, their corresponding state law counterparts. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974); *Muncy*, 650 F. Supp. at 644; *Raytheon Co. v. Fair Employment and Housing Commission*, 46 FEP Cases (BNA) 1089, 1099 (California Superior Ct., Santa Barbara County, 1988) (Based upon legislative history, the court found that Congress did not intend the Rehabilitation Act to occupy the field of employment discrimination against the handicapped by federal contractors); *Cf., Tate v. Browning Ferris, Inc.*, 833 P.2d 1218, 1222-1223 (Okla. 1992). Furthermore, when Congress enacted the Rehabilitation Act, it was fully aware of the existence of overlapping state remedies in employment discrimination cases and the existence of state handicap discrimination laws and other common law claims. *Miles v. Apex Marine Corp.*, 498 U.S. at 32, 111 S. Ct. at 325; *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). Had it wanted the Rehabilitation Act to preempt state law, Congress knew the state of the law and would have expressly so stated. Congress chose not to preempt state law because it has consistently believed that state laws fill a

crucial role in eradicating the nation's workplaces of employment discrimination. *California Federal Savings & Loan Assn. v. Guerra,* 479 U.S. at 282-83; *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468-69 (1982). "The exercise of federal supremacy is not lightly presumed." *Schwartz v. Texas,* 344 U.S. 199, 203 (1952). Moreover, a presumption exists against preemption which petitioner cannot overcome. *Cipollone v. Liggett Group, Inc.,* 60 U.S.L.W. 4703, 4706, 4707 (U.S., June 24, 1992); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981).

Nonetheless, petitioner anchors itself to *Howard* and references the "pervasive" regulations issued under section 503. However, the Court has rejected the proposition that even comprehensive regulation is an implied attempt to displace state law. *E.g., English,* 110 S. Ct. at 2279; *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 149 (1986); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 716-18 (1985). Otherwise, the power of preemption would be impermissibly delegated to the control of the federal agencies.

Congress' most recently stated and obvious intent is evident from the A.D.A.[12] which amended the Rehabilitation Act and which also will extend the same basic Rehabilitation Act protections to virtually all private sector employees. Thereunder, Congress preserved an express role for state handicap laws and made no indication that this constituted a change in method.[13] Clearly, had Congress intended to preempt state law, it would have said so.[14]

The A.D.A. addresses the issue of federal preemption of state law but does so with a narrow scope. "Nothing in this

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[12] At page 10 of the petition, Exxon gratuitously and somewhat deceitfully suggests that Ellenwood has a federal remedy under the A.D.A. Ellenwood has no such remedy available to him.

[13] *Heckler v. Turner,* 470 U.S. 184, 208-211 (1985) ("Were there any doubt remaining as to Congress' intention in 1981, subsequent congressional action would dispel it.").

[14] Congress is presumed to be thoroughly familiar with the state of the law. *Cannon,* 441 U.S. at 696-699.

chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . or jurisdiction that provides *greater or equal protection* for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b) (emphasis supplied). The A.D.A. employment provisions also expressly address the issue of preemption and say nothing about intending to preempt state employment discrimination law. 42 U.S.C. § 12113(d)(3). Again, had Congress wanted the Rehabilitation Act to preempt state law, then it would have said so. *Cannon*, 441 U.S. at 703.

Finally, Congress' intent is apparent from the procedural provisions of the A.D.A. which incorporate a specific and important role for state handicap discrimination statutes into the A.D.A. 42 U.S.C. § 12117.[15] The following section amplifies this role.

> In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section.

42 U.S.C. § 2000e-5(b) (emphasis supplied); 42 U.S.C. § 12117. It is clear beyond peradventure that Congress never intended federal employment discrimination statutes to be used to preempt state laws on the same or similar subjects.

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[15] Also, this case is about employment discrimination against an employee who was treated for a non-work related alcoholism handicap after apparently being misdiagnosed (Tr. Vol. V:133). The two federal statutes and the three state statutes (only one of which will ultimately apply) are uniform on how to address this perceived handicap issue. In fact, respondents are not aware of any contrary authority on this issue. Consequently, even if petitioner's argument holds some water, this case does not present an instance where uniformity is in issue. *Cf., Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. at 721-22 ("the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent. . . . It is, of course, possible that States could impose such onerous, harassing, and conflicting conditions on an interstate carrier's hiring of employees that the burden would hamper the carrier's satisfactory performance of its functions. *But that is not this case.*" (emphasis supplied).

Thus, even Exxon must concede that since the A.D.A. applies to federal contractors which happen to be employers with at least fifteen employees, then so must state law.

The Court reviewed an analogous issue in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., supra.* Curiously, Continental raised the exact same argument as Exxon has here: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go." *Id.*, 372 U.S. at 722, *citing, Charleston & W.C.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). However, in reply, the Court squarely rejected this proposition.

> But this Court has also said that the mere "fact of identity does not mean the automatic invalidity of state measures." To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here.

Id.; Cf., English, 110 S. Ct. at 2280-81; *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. at 722; *See also, A.D.A.*, 42 U.S.C. § 12201(b).

Even more notable was Continental's unsuccessful "pervasiveness" argument concerning government contractor status and anti-employment discrimination provisions contained in various Executive Orders. In rejecting this strikingly similar argument, the Court succinctly held: "It is impossible for us to believe that the Executive intended for its orders to regulate all carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose." *Continental Air Lines,* 372 U.S. at 725.

In conclusion, Exxon has failed to create an issue of enough significance for this Court to grant the petition. The decisions of the First and Eleventh Circuits are not in conflict. No evidence exists that Congress intended to preempt unrelated, independent state handicap law rights or remedies

for those few employees who work for employers which fortuitously have the federal government as a $2,500 customer. Common sense, precedent from this Court and the A.D.A. make it obvious that Congress intended otherwise. Accordingly, the petition should be denied.[16]

III. THE MARITIME EMPLOYMENT CONTRACT CLAIM IS WELL SUPPORTED IN THE LAW AND ON THE RECORD.

Two things are quite clear: the First Circuit's ruling is (1) not one of first impression, and (2) not one of such importance to merit review. Maritime contracts of employment, express, implied, oral or otherwise have formed a bedrock aspect of admiralty law from time immemorial. *Kossick*, 365 U.S. at 734-35, n.4; *Union Fish Company v. Erickson*, 248 U.S. 308 (1919); *Robertson v. Baldwin*, 165 U.S. 275, 282-83 (1897) ("From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving to a certain extent, the surrender of his personal liberty during the life of the contract."); *Farrell v. United States*, 336 U.S. 511, 519-521 (1949) (contract for even an indefinite term is nonetheless an enforceable maritime employment contract); *Tonseth v. Serwold*, 157 P.2d 333, 338 (Wash. 1945). Since 1790, Federal Court policy has been to protect the seaman and enforce his contract. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 356 (1971); Furthermore, the duties owed by the employer to a ward of admiralty equate with those owed by a

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[16] At the end of its argument, on page 22 of its petition, and without addressing the substance of its comment, Exxon asks the Court to also review Ellenwood's "state contract claims." This is the same tired argument which Exxon has hoisted before and which the district court branded "clear nonsense." (App. 41a). Furthermore, Ellenwood's contract claim was tried under federal maritime law and thus Exxon's comment makes no sense. Preemption is a constitutional doctrine developed under the Supremacy Clause, which, under certain limited circumstances, invalidates *state* laws. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); *Massachusetts Medical Society v. Dukakis*, 815 F.2d 790, 791-96 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987).

trustee to his beneficiary and a guardian to his ward. *Premeaux v. Socony-Vacuum Oil Co.*, 144 Tex. 558, 564, 192 S.W. 2d 138, 140 (1946). To disavow a contract in this case violates these duties. Moreover, Exxon's tenacious clinging to the principle of employment at will when it has no factual or legal connection to this case is at best a smokescreen for its patent lack of any colorable argument to support its petition.

As explained in the statement of the case, the substantial record evidence demonstrated the existence of a contract of employment which was other than at will. However, petitioner continues to disingenuously and selectively refer to the evidence to suit its needs regardless of the record before the jury and the fact that the jury, the District Judge and the First Circuit squarely rejected petitioner's manipulative factual arguments.[17] Nonetheless, "(t)his is not the place to review a conflict of evidence. . . . " *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951).[18] Rather, all facts necessary to support the judgment must be taken as found by the jury; otherwise there will be a near certain

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[17] Also, Exxon improperly continues to cite to selected paragraphs of the Complaint to make its arguments. The jury never saw the Complaint but it did see and hear over two weeks of evidence as did the presiding Judge who denied Exxon's motions for judgment as a matter of law and for a new trial (1a). At this stage, the Complaint is superfluous. *Fed.R.Civ.P.* 15. The purpose of a complaint is to give concise notice of the plaintiffs' claims. *Fed.R.Civ.P.* 8(a), 8(e) and 8(f). Moreover, given the Court's special solicitude for the seaman, it is an "ancient admiralty teaching" that the rules of pleading are even further relaxed in admiralty. *Archawski v. Hanioti*, 350 U.S. 532, 534 (1956). Thus, even if Exxon's characterizations of the Complaint are accurate, "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend *does not affect the result of the trial of these issues* . . . ." *Fed.R.Civ.P.* 15(b) (emphasis supplied).

[18] "In admiralty, as in other fields of the law, findings of the trier of fact will not be disturbed on appeal, unless the error is manifest clearly against the evidence." *Putnam v. Lower*, 236 F.2d 561, 565 (9th Cir. 1956), *citing, United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948); *McAllister v. United States*, 348 U.S. 19, 20, 21 (1954). No such argument has been made.

collision with respondents' Seventh Amendment right to trial by jury. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Lumbermens Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n. 5 (1954); *Smiley v. Kansas*, 196 U.S. 447, 454 (1905). "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U.R.Co.*, 321 U.S. 29, 35 (1944). The jury has performed this function and its reasoned judgment should not be disturbed.

Furthermore, the record evidence upon which the jury founded its verdict contained much more than a mere policy statement. The evidence supported an express employment contract with an offer, an acceptance, a meeting of the minds, definite terms, duration and consideration (Tr. Vol. XI:43-44, 58, 69). The evidence demonstrated contracts, representations, letters, writings, policies and oral and written promises in addition to an employment policy.[19] Ellenwood and Exxon presented evidence from which the jury was free to conclude that a contract of employment existed, terminable only for just cause and that this contract was initiated by Exxon. Even Exxon's witness admitted that a "contract" existed (Tr. Vol. V:22); *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 48 (5th Cir. 1970). Based upon the evidence, the jury properly found that Ellenwood and Exxon entered a maritime employment contract on other than an at-will basis. That Exxon's entire petition obfuscates the facts and completely ignores the record is not grounds for relief.[20]

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[19] Exxon seeks an inflexible rule in its favor based, *inter alia*, on its shipping articles. This argument is not based upon the record evidence. In fact, respondents could not pursue possible related causes of action because of petitioner's dilatory production of certain related documents at such a late stage of the trial that strategically, respondents were forced to leave them out of the case (Tr. Vol. V:214-217; VII:6-7).

[20] In addition, even if petitioner's selective focusing upon the policy statement is otherwise appropriate, whether the parties intended the policy to constitute an express or implied contract was a question of fact which the jury resolved in respondents' favor. *Brown v. United Methodist Homes*, 815 P.2d 72, 83 (Kan. 1991).

Moreover, even were this employment policy the true issue, the Court has already settled petitioner's purported implied contract issue. The Court has always recognized the existence of implied contracts in maritime employment. *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 730 (1943) (maintenance and cure "has been recognized consistently as an implied provision in contracts of marine employment."); *Lauritzen v. Larsen*, 345 U.S. 571, 588 (1953); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371, 372 (1932); *Hust v. Moore-McCormack Lines*, 328 U.S. 707, 715-16 (1946) (Jones Act remedy); 28 U.S.C. § 1333(1).

Further, with regard to Exxon's ridiculous argument that Ellenwood was an employee at will, *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A 1981) and *Findley v. Red Top Super Markets, Inc.*, 188 F.2d 834 (5th Cir.), *cert. denied*, 342 U.S. 870 (1951), do not provide a basis for granting its petition. In *Smith*, the Fifth Circuit created an exception to the contractually based employment at will rule for a seaman who admittedly was an employee at will. The issue of whether Smith was employed at will or whether, like Ellenwood, he had a contract to the contrary, was not before the court. In *Findley*, an unauthorized person started to hire a ship's crew. Before employment contracts could be signed, the crew was advised that the person who had hired them was not so authorized and that they should leave the ship. *Findley*, 188 F.2d at 835. Thus, the entirety of the conduct in issue in *Findley* happened before and without a contract ever being entered.[21]

Finally, Exxon's review of the common law of several states misses the point and violates the Local Rules of the Ninth Circuit. First, as explained above, this case is not merely based upon a policy statement on substance abuse.

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[21] In addition, the *Findley* court's analysis is faulty under the Court's precedent. *Compare*, 188 F.2d 834, fn. 1 with *Kossick, supra*. Thus, *Findley* is not good law and to the extent that *Smith* relies on *Findley*, neither is *Smith*. None of this, however, creates a federal question of such importance that the petition should be granted.

Even Exxon's own official testified that Exxon and Ellenwood made a "contract" (Tr. Vol. V:22). Exxon made this official responsible for deciding whether Ellenwood could return to work after he attended the rehabilitation program. Second, in its review of what it labels "prevailing" state law, Exxon improperly relies upon two decisions, *Franklin v. Delta Airlines, Inc.*, 951 F.2d 359 (Table) (text in WESTLAW) (9th Cir. 1991) and *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d 1194 (10th Cir. 1990). With regard to *Franklin*, various notices appear with the Westlaw published decision.

> NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Id. (emphasis supplied). Moreover, *Franklin* is distinguishable as that employee signed documents expressly providing that he was an employee at will and the handbook upon which Mr. Franklin sought to rely contained an employment at will disclaimer and stated that his employment was at will.[22] *Horne* is also distinguishable as that plaintiff was also an employee at will under Wyoming law and while recognizing that personnel policies can create a contract of employment, that court wanted evidence in addition to the "mere existence" of those policies. *Horne*, 894 F.2d at 1195. As this record amply demonstrates, here there is much more evidence, including many representations which Exxon would now prefer to ignore than to respect. Furthermore, the prevailing state law of virtually every jurisdiction recognizes these claims, especially when, like here, the policy does not contain a disclaimer of employment at will. *See, Labor Relations Reporter: Individual Employment Rights Manual (BNA)* 505:5, 51-52 (July 1992); 28 U.S.C. § 1333(1). This black

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[22] Hawaii law, upon which the decision is based, recognizes the existence of contractual rights based upon employment handbooks. Id.; *Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110 (Haw. 1986).

letter law rings true within the admiralty jurisdiction. *Stetson*, 673 F. Supp. at 1135, 1136.

> Certainly it requires no citation of authority to support the statement that the Supreme Court of the United States and various of the United States Courts of Appeals have never, in construing Maritime Law, afforded a less favorable position to the seaman, the much favored ward of Admiralty, than the position afforded to the average, ordinary common law suitor.

Henderson v. Arundel Corp., 262 F. Supp. 152, 157 (D. Md. 1966).

Denying the petition will only serve to encourage irresponsible employers to be more responsible in how they structure their employment relationships, policies and practices. Any contrary prediction of a chilling effect is wholly imaginary. Also,

> (i)t must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself creates some presumption in favor of that law tending toward the validation of the alleged contract.

Kossick, 365 U.S. at 741. In sum, this case is an ordinary run of the mill contract dispute based on a well developed factual record which supports the result of which petitioner complains. This "self-imposed obligation" does not raise a question of such importance that this Court need be burdened with a review of an already thorough and sound opinion below (App. 21a).

The petition should be denied.

CONCLUSION

This case is about a seaman who had to seek the protection of the Federal Courts because after he was misdiagnosed an alcoholic (according to his employer's expert) and sought

treatment, his employer used the fact of his treatment to fire him in a crude public relations ploy to rebuild its public image in the wake of the Exxon Valdez. The Federal Courts have always served as a place of refuge and protection for the seaman, who, over the years, has needed the Courts' protection from abusive employment practices. The principles which the Court has developed reflect "a special solitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. State Marine Lines, Inc.*, 398 U.S. at 387. Declared to be "a settled canon of maritime jurisprudence," "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281-82 (1980) (citations omitted); *Moragne*, 398 U.S. at 387, *citing, The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (C.C. Md. 1865). This ward of admiralty only seeks the same protection as that which the Court has extended to his brethren whom he has followed down to the sea.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 20, 1993

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THEODORE M. ELLENWOOD, et al.,	)	
Plaintiffs	)	Civil No. 90-86-P-C
v.	)	
EXXON SHIPPING COMPANY,	)	
Defendant	)	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR NEW TRIAL

Exxon Shipping Company has renewed its motion for judgment as a matter of law on the Ellenwoods' negligent infliction of emotional distress claims. Fed R. Civ. P. 50(b). In the alternative, Exxon Shipping asks that I overturn the jury verdict and order a new trial. Fed. R. Civ. P. 59. Exxon Shipping also moves for a new trial and judgment as a matter of law on the breach of contract and promissory estoppel claims, alleging several errors in the jury instructions and other miscellaneous legal errors. I now *GRANT* the motion for judgment as a matter of law with respect to the negligent infliction of emotional distress claim, *DENY* the motion for new trial on the negligent infliction count and *DENY* the motion on the contract and promissory estoppel claims.

Emotional Distress

I have previously ruled that the emotional distress claims are governed by maritime law. *See Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. at 4-5 (Oct. 15, 1991); *see also Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. at 1-3 (Jan. 2, 1992) (granting Exxon Shipping's motion for summary judgment on breach of duty of good faith and fair dealing claim). I will not repeat my reasons here. My research and that of the parties have revealed that reported maritime law, however, is essentially mute as to the controlling substantive rules in this case. Exxon Shipping has argued that since no explicit authorization for the Ellenwoods' claims can be found in maritime law, those claims should be dismissed on that ground alone. Unambiguous dicta in a governing line of maritime cases, however, require me to pursue the subject farther.

In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986), the United States Supreme Court stated: "Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." In that case, the Supreme Court recognized and endorsed lower court adoption of general negligence principles and products liability law as part of the general maritime law. Moreover, the Court recognized that maritime law, in the absence of a statute, is "developed by the judiciary." *Id.* at 864.

Under First Circuit authority, state law or general common-law principles may inform the general maritime law when the maritime law is silent on a particular issue,

provided that state law does not conflict with Congressional maritime policy. *See Conner v. Aerovox, Inc.*, 730 F.2d 835, 842 (1st Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) ("There is no question that federal courts may borrow from a variety of sources in establishing common law admiralty rules to govern maritime liability where deemed appropriate."); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10, 14 (1st Cir.), *cert. denied*, 444 U.S. 900 (1979) (applying § 766 of the *Restatement (Second) of Torts* as a "recognized national standard from which to fashion a controlling principle of substantive federal maritime law"); *accord, Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427 (5th Cir. 1983) ("In maritime tort cases courts traditionally apply principles of maritime law, as informed by common law tort developments, . . . unless a policy determination has been made by Congress. . . . Admiralty courts make their own decisions but, true to legal analogical processes, do so with an awareness of other courts' solutions to similar problems. . . . ").

These cases make clear that I cannot dismiss a claim merely because maritime precedents are silent, but that I should turn to well-established common-law principles of national applicability in determining the scope of a claim in such circumstances. The concern for uniformity, frequently expressed by the courts and emphasized in my order on Exxon Shipping's summary judgment motion, *Ellenwood v. Exxon Shipping Co.*, No. 90-0086-P-C, slip op. at 4 n.5 (October 15, 1991), supports employing only those common-law principles that have been widely and consistently recognized in land-based law. Furthermore,

paramount attention must be paid to Congressional policy directives expressed in maritime legislation. Accordingly, I approach the claim of negligent infliction of severe emotional distress guided by Congressional policy pronouncements embodied in the Jones Act and judicial glosses on those enactments; by time-honored articulations of common-law principles, such as the *Restatement (Second) of Torts;* and by trends in state common-law doctrine.

Much of the parties' argument has focused on several FELA/Jones Act cases.[1] The Ellenwoods' claim for negligent infliction of emotional distress, however, is not a Jones Act claim. They chose not to plead the Jones Act; instead, their claim arises under general maritime law. Nonetheless, FELA/Jones Act case law is a sensible place to look for guidance. The Jones Act articulates Congress' general policy on the limits of seamen's recovery for negligence. Thus, a court should not lightly exceed any limitations laid down in the Jones Act or in authority interpreting the Jones Act or FELA.

In 1977, it seemed clear in this Circuit that recovery for emotional distress under FELA, and thus the Jones Act, required a physical injury. *Bullard v. Central Vt. Ry.*, 565 F.2d 193, 197 (1st Cir. 1977). In 1985, however, a Ninth Circuit decision stated that plaintiffs could recover emotional damages under FELA without any physical injury. *Buell v. Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320, 1322-23 (9th Cir. 1985). The United States Supreme Court

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[1] The Jones Act incorporates FELA's standards for liability. *See* 46 U.S.C. app. § 688(a).

undertook to hear the *Buell* case but then declined to consider this particular issue because of the lack of an adequate record: "Since, through no fault of either party, we do not know what all those facts are in this case, we cannot begin to decide whether respondent will be able to support his allegation that petitioners are liable to him under the FELA." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 570 (1987). Although the Court declined to rule on this issue, it nevertheless provoked an unfortunate uncertainty in the trial bar and the lower courts by adding, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity," *id.* at 568, and, therefore, that "the question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer," *id.* at 570.

That same year the First Circuit brought the uncertainty home to this jurisdiction. In *Moody v. Maine Cent. Ry. Co.*, 823 F.2d 693 (1st Cir. 1987), it affirmed a case from this district granting summary judgment on an emotional distress claim to a defendant where there was no physical injury. But like the United States Supreme Court it succumbed to the temptation to raise other possibilities, thereby engendering uncertainty among trial lawyers and trial courts. It officially read *Buell* as "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open," *id.* at 694, and concluded that the Supreme Court, "at the very least, [cast] doubt on the doctrine attributed to us in *Bullard* that damages may not be awarded for mental or emotional injuries unaccompanied by physical injury." *Id.*

Rather than resolve this open issue after highlighting it, however, the First Circuit declined "the invitation to make this a pioneer case exploring the frontier possibly opened up by *Buell*," and left the trial bar and the trial courts to bear the consequences of the highlighted uncertainty.[2]

In light of the First Circuit's *Moody* declaration, I concluded before trial that Jones Act principles were unclear and that, although the Jones Act was not finaly determinative of the issue in this maritime case, its role was sufficiently important that I should allow the negligent infliction claim to go to the jury so that the First Circuit would have a record upon which to rule. Had I followed the old rule (which I do today for reasons I will explain shortly) and been declared wrong, the subsequent reversal by the First Circuit would have required a new trial of this lengthy case which has already consumed thousands upon thousands of dollars. Since an appeal was highly likely, I decided that the more prudent and

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[2] Tantalizing references to possibilities in other cases not then before the court have been a luxury that appellate courts could afford in more innocent times. Perhaps the practice even helped judges participate in the development of the common law by inviting further litigation. But now we operate in an era where we are told that federal litigation is too frequent and that it is both too time consuming and too expensive. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, § 102 (1990) (codified as 28 U.S.C. §§ 471-482). When an appellate court raises a new issue without resolving it, it guarantees that the cost of litigation will increase. Another decision point is created: briefs must be written, facts must be adduced, motions must be presented and lower court judges must try to divine what the appellate courts are looking for.

more economical course was to permit the plaintiffs to put in their case as if the First Circuit had indeed changed the FELA/Jones Act rule and as if the change would affect the governing principle in this maritime case. I now rule, however, that as a trial court judge I cannot read the First Circuit's musings in *Moody* as having overruled the *Bullard* rule. *Moody* did not explicitly overturn *Bullard.* Certainly there are hints and half-steps there. But as a trial judge I must follow the precedents as they exist. Should the First Circuit decide to overrule *Bullard* and decide that this new FELA/Jones Act principle controls this maritime case, the record has been made and the Circuit can simply reinstate the jury's verdict. On the other hand, if the First Circuit chooses not to overrule *Bullard,* then it is in a position to affirm the judgment on the law.

I therefore conclude that under *Bullard* a physical injury is still required to recover emotional distress damages under FELA. Since the Jones Act incorporates FELA standards for liability, *Bullard* must be read as recognizing a general congressional policy limiting maritime recovery for negligent infliction of emotional distress to those claims based on physical injury. Today I apply that policy in this maritime case.

Applying the *Bullard* rule is not simply the triumph of *stare decisis.* Imposing such a limitation under general maritime principles is supported by what has taken place in other areas. The nationwide movement toward a standard allowing recovery for wholly emotional injury without some physical manifestation has been halting. The *Restatement (Second) of Torts* was quite clear in requiring

physical injury as an element of a negligent infliction of emotional distress claim in 1965:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965). Comment b discusses the three traditionally favored policy rationales for this rule: first, emotional disturbances without physical consequences have traditionally been regarded as "in the realm of the trivial," and therefore fall "within the maxim that the law does not concern itself with trifles"; second, a physical harm requirement furnishes a "guarantee of genuineness" to the fact-finder, thus limiting the prospects for a flood of fraudulent claims; and third, when the level of culpability reaches only the level of negligence, the "fault is not so great that [the actor] should be required to make good a purely mental disturbance." *Id.*, comment b.[3]

The *Restatement* enunciation of the rule is now over 25 years old, and some jurisdictions, among them Maine, have abandoned the physical injury requirement. *See*

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[3] The *Restatement* did envision a separate tort without physical injury: intentional or outrageous infliction. *See Restatement (Second) of Torts* § 46 (1965). Elimination of the physical injury requirement for the negligence tort essentially eliminates the need for the intentional tort. It is hard to imagine a case in which a factfinder can find intentional and outrageous conduct but not find a breach of the standard of care or negligence.

Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282 (Me. 1987). But the trend is not uniform. In *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982), the Massachusetts Supreme Judicial Court resisted the invitation to allow recovery for negligently inflicted emotional distress in the absence of corresponding physical harm. That court observed in 1982 that "[j]urisdictions allowing recovery for emotional distress without proof of physical harm in negligence cases are clearly in the minority." *Id.* at 174-75; *see also id.* at 175 n.5 (surveying rules in various jurisdictions). Recent academic commentary continues to reflect the division of authority: "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery." W. Page Keaton, et al., *Prosser and Keeton on the Law of Torts* § 54 at 361 (5th ed. 1984). *See also* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781 (1988) ("Currently, a large number of jurisdictions follow a combination of both the zone of danger and physical manifestation tests as limiting devices on actions for negligent infliction of mental distress.")[4]

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[4] Although the physical injury rule seems arbitrary in the sense that there may be legitimate emotional distress claims without physical injury, it does have the great advantage of being easily defined and determined in today's complex litigation world. With expensive expert testimony available to support or reject almost any claim, a clear and easily-applied rule

Thus, the *Restatement* and a significant number of state jurisdictions are in agreement with the Congressional policy choices articulated by the First Circuit in *Bullard*. Therefore, I conclude that a plaintiff alleging negligent infliction of emotional distress under the general maritime law must prove an accompanying physical injury. No evidence of physical injury or physical impact was presented to the jury here.[5] Exxon Shipping's motion for judgment as a matter of law on these claims is therefore **GRANTED.** The Clerk shall enter judgment for the defendant on Count VIII.[6] Exxon Shipping has not advanced any other argument that would justify granting

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saves parties large amounts of litigation costs and attorney fees and reduces needed judicial time. Other tests that may involve multitudes of factors such as suggested by the Supreme Court in *Buell*, 480 U.S. at 568-70, might result in better individual justice in a given case yet so contribute to the expense and time-consuming nature of the litigation process that justice would be delayed and thereby denied in many other cases. In this era of scarce resources courts cannot ignore such effects.

[5] The Ellenwoods did offer some evidence of loss of sleep, loss of appetite, etc. However, this is clearly not the kind of physical injury contemplated by *Bullard*, nor by the *Restatement (Second) of Torts*.

[6] Exxon Shipping also argues in its motion for judgment as a matter of law that the evidence was insufficient to support a finding that the Ellenwoods suffered severe emotional distress. I conclude that there was sufficient evidence in the record on both the severity of the Ellenwoods' emotional distress and causation to have created a jury question.

Finally, Exxon Shipping argues that the jury verdict should be overturned because there were no guarantees of genuineness supporting the Ellenwoods' claimed injury. This contention is resolved by my conclusion that physical injury is still a precondition for recovery.

a new trial. Therefore, Exxon Shipping's motion for new trial on Count VIII is **DENIED.**

This ruling, of course, also supports my earlier denial of punitive damages. Without a tort recovery, the plaintiffs are not entitled to punitive damages.

Contract and Promissory Estoppel

Exxon Shipping moves for a new trial or for judgment as a matter of law on both the breach of contract and promissory estoppel verdicts.[7] It advances four arguments: first, that I erred in allowing the contract and promissory estoppel claims to go to the jury because at-will employment rules preclude the possibility of finding that a contract or enforceable promise existed; second, that the Rehabilitation Act of 1973 pre-empted Ellenwood's breach of contract and promissory estoppel claims; third, that I erred in instructing the jury not to subtract Mr. Ellenwood's annuity from its award of damages; and fourth, that I erred in my instruction concerning Exxon Shipping's employee ranking system. Only the last of these arguments raises any new issues.

I addressed the first two objections in my order issued October 15, 1991, on Exxon Shipping's motion for summary judgment. *Ellenwood v. Exxon Shipping Co.*, No.

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[7] The jury found for Ellenwood on both the breach of contract and the promissory estoppel claim. The jury awarded $677,648 for the breach of contract claim and zero dollars for the promissory estoppel claim. However, it is quite clear that the jury was simply avoiding duplication of damages in accordance with my instructions, and that the damage award is supported by both claims.

90-0086-P-C, slip op. at 2-4 & 5-6 (October 15, 1991). Exxon Shipping does not raise any new arguments in this post-trial motion, and I see no reason to disturb my earlier rulings on these two matters.

Exxon Shipping's argument that my instruction on the annuity was in error was the subject of a lengthy conference of counsel on the morning of closing arguments. The lawyers had an opportunity to argue the issue fully, *see* Tr. Volume XI, page 2, line 1 – page 23, line 11, and I gave a detailed ruling in chambers, *see* Tr. Volume XI, page 33, line 13 – page 35, line 17, and reiterated the ruling at sidebar, *see* Tr. Volume XI, page 72, lines 20-21. Given the state of the record, I see no basis for a different ruling.

Finally, Exxon Shipping argues that my instruction concerning the company's employee ranking system was in error. This issue was addressed in the conference of counsel on the morning of closing arguments, *see* Tr. Volume XI, page 23, line 16 – page 29, line 14. Exxon Shipping also raised its objections at sidebar and suggested an alternative instruction, *see* Tr. Volume XI, page 64, line 14 – page 66, line 9. I reiterated my previous resolution of the issue at sidebar as well, *see* Tr. Volume XI, page 69, line 17 – line 22; page 72, line 6 – line 14. As I said there, the conventional instruction used in discrimination cases cannot simply be transposed without modification to this damage causation issue in a contract/estoppel case. The issues and policies at stake are different.

Here, however, Exxon Shipping does raise one new issue. The company refers to my memorandum and order

on the punitive damages claim, issued on February 21, 1992. *Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. (Feb. 21, 1992). There, I engaged in a thorough review of the record to determine whether the plaintiffs had presented sufficient evidence to proceed with their punitive damage claim. I attempted to simplify the task of reviewing a voluminous record by breaking the evidence down into separate categories. *Id.* at 5-8. One of those categories was evidence concerning Exxon Shipping's employee evaluation and ranking procedures. I evaluated this evidence in light of the maritime law standard for punitive damages and found that the plaintiffs had not presented evidence concerning Exxon Shipping's conduct to justify allowing them to proceed with their punitive damages claim.

Exxon Shipping now attempts to use the language of my memorandum opinion on punitive damages for the negligence claims as a vehicle for arguing that it is entitled to judgment as a matter of law on the contract and estoppel claims.[8] But in doing so, it ignores the context of the punitive damage opinion. In that opinion I was reviewing the evidence to determine whether a reasonable juror could have found that the plaintiffs showed that Exxon Shipping acted with the level of culpability

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[8] Exxon Shipping refers specifically to two passages in that opinion. First, on page 7, the opinion states, "However, there was no testimony to indicate that the rankings were intentionally manipulated with the intent of denying or subverting the rights of any employees." *Id.* at 7. Second, a passage on page 9 states, "There was no testimony that the ranking process was intentionally manipulated or used in a way to undermine the rights of Ellenwood." *Id.* at 9.

necessary to justify punitive damages. The focus of that inquiry was the plaintiffs' burden of proof to show the blameworthiness of Exxon Shipping's conduct. I found that no reasonable factfinder could conclude the plaintiffs had met their burden of proof.

The issue raised by Exxon Shipping in its motion presently before the court is distinct from the punitive damage inquiry. Here, the issue is not the plaintiffs' burden of proof on punitive damages, but Exxon Shipping's burden of proof in minimizing the Ellenwoods' contractual or estoppel damages. In order to reach this issue, the jury must first have found (as it did) that Exxon Shipping breached its contract (or principles of promissory estoppel) with Ellenwood when it removed him as Chief Engineer and that damages flowed from that event. Exxon Shipping is seeking to limit those damages by trying to prove that Ellenwood would later have been terminated anyway. Since Exxon Shipping bears the burden of proof on this issue (and this is *not* a discrimination case where Exxon Shipping would have only the burden of *articulating* a nondiscriminatory motive), I am doubtful that judgment could ever be entered in its favor as a matter of law. The jury was always free to disbelieve any or all of Exxon Shipping's evidence on this issue of termination for independent reasons. Thus, it is completely consistent to rule that the Ellenwoods had not met *their* burden of proof to show conduct by Exxon Shipping that would justify punitive damages, yet rule that the jury could choose to disbelieve Exxon Shipping's evidence that it would have terminated Ellenwood for independent reasons.

Exxon Shipping characterizes my statements in the punitive damage opinion as a finding that Ellenwood

would have been terminated for "independent, non-pretextual reasons." Reply Memorandum in Support of Exxon Shipping Company's Motions for Judgment as a Matter of Law and for a New Trial, at 2. Given the difference between the two inquiries, Exxon Shipping has clearly mischaracterized the punitive damage opinion. My finding that the plaintiffs failed to carry their burden on punitive damages cannot result in a conclusion as a matter of law that Exxon Shipping prevailed on a limitation of damages issue where Exxon Shipping had the burden of proof.

I see no reason to disturb my earlier ruling on this part of the jury instruction. Exxon Shipping's motion for judgment as a matter of law or for a new trial on the contract and promissory estoppel claims is **DENIED.**

SO ORDERED.

Dated at Portland, Maine this 26th day of March, 1992.

/s/ D. Brock Hornby
D. Brock Hornby
United States District Judge

A TRUE COPY
ATTEST: William S. Brownell, Clerk

By /s/ Brenda R. Gilland
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 28 1993
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No. 92-1589

In The
Supreme Court of the United States
October Term, 1992

EXXON SHIPPING COMPANY,
Petitioner,

v.

THEODORE M. ELLENWOOD and
ANN M. ELLENWOOD,
Respondents.

STATE OF MAINE,
Intervenor-Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Whether the provisions of state employment discrimination laws relating to physical disabilities are preempted by federal admiralty law under the circumstances of this case.

2. Whether the provisions of state employment discrimination laws relating to physical disabilities are preempted by section 503 of the Rehabilitation Act of 1973, 29 U.S.C.§ 793, in cases involving federal contractors.

3. Whether federal admiralty law recognizes the employment contract that formed the basis for plaintiff's contract claims in the case at bar.

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In the
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Respondents.

STATE OF MAINE
Intervenor

STATE OF MAINE'S BRIEF IN OPPOSITION TO CERTIORARI

Respondent-Intervenor State of Maine respectfully requests that this Court deny Exxon Shipping Co.'s petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit that is reported at 984 F.2d 1270 (1st Cir. 1993) and reproduced in the Appendix to the Petition for Certiorari (App.) at 1a-38a.

STATUTES INVOLVED

The Maine Human Rights Act, 5 Me.Rev.Stat.Ann.§ 4572(1) (Supp. 1992), provides in pertinent part as follows:

> It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:
>
> > A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin, . . .or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; . . .
> >
> > . . . .
> >
> > E. For an employer, employment agency, or labor organization to discriminate in any manner against individuals because they have opposed a practice that would be a violation of the Act or because they have made a

> charge, testified or assisted in any investigation, proceeding or hearing under this Act.

STATEMENT OF THE CASE

The State of Maine intervened in this action pursuant to 28 U.S.C. § 2403(b) in order to present argument on the issue of whether state employment discrimination laws are preempted by section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, or by federal admiralty law.[1] For purposes of this brief, the State will rely upon the summary of the case contained in the First Circuit's opinion. 984 F.2d at 1272 (App. 2a-3a).

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[1]Because the Maine Attorney General's office was not notified that these issues had been raised until the case was on appeal, the State intervened while the case was pending in the First Circuit. *See* 984 F.2d at 1272 n.2 (App. 3a n.2).

REASONS FOR DENYING THE WRIT

Because the State intervened in this action solely to offer argument of the issue of preemption, it will address only the first two of the questions presented by Exxon Shipping's petition for certiorari.

I. SINCE THE ISSUE OF PREEMPTION IS NOW GOVERNED BY THE AMERICANS WITH DISABILITIES ACT, THERE IS NO REASON TO GRANT CERTIORARI IN THIS CASE.

As a preliminary matter, the employment discrimination claims asserted by Theodore Ellenwood in this case arose before the effective date of the Americans with Disabilities Act of 1990 ("ADA"), Pub.L.No. 101-336, 42 U.S.C. § 12101 *et seq.*[2] The ADA is now the governing source of federal law with respect to employment

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[2]Pursuant to section 108 of Pub.L. No. 101-336, the employment discrimination provisions of the ADA took effect on July 26, 1992.

discrimination against persons with disabilities. This includes seamen like Ellenwood. Indeed, Exxon Shipping expressly acknowledges in its petition that the ADA would now govern employment discrimination suits by a seaman in Ellenwood's position. Petition at 10, 17.

Moreover, the ADA directly addresses the issue of preemption; it contains an express anti-preemption provision. 42 U.S.C.§ 12201(b). As a result, if a similar case were to be brought today, the issue of preemption would be resolved under the ADA, not under the Rehabilitation Act or under principles of admiralty law.

The existence of the ADA totally undercuts Exxon Shipping's arguments as to the importance of this case. While this case remains a matter of considerable importance to the parties, the preemption

issues raised in the petition have been rendered largely academic by the ADA. The State is not aware of any reason why this Court should explore the question of whether state employment discrimination statutes were preempted under the law as it existed prior to the ADA.

Exxon Shipping devotes considerable space in its petition to a discussion of the alleged problems that the maritime industry will face in the future if subjected to inconsistent obligations under state employment discrimination statutes. Although the State believes that Exxon Shipping's catalog of potential

inconsistencies is greatly exaggerated,[3] any problems that currently exist result from the anti-preemption provision of the ADA and cannot be cured by review of the First Circuit's decision in this case. Accordingly, the preemption issues raised by Exxon Shipping would not warrant certiorari even assuming for purposes of argument that there might be some merit to Exxon Shipping's criticisms of the First Circuit's decision.

However, as discussed below, there is in fact no merit to Exxon Shipping's contentions. The First Circuit's decision is consistent with existing principles of

---

[3]In this connection, it should be noted that Exxon Shipping's alleged concern that a single vessel might simultaneously be made subject to 50 different state laws can be resolved through application of standard choice of law rules. Indeed, the First Circuit expressly open the issue of which state's employment discrimination statute would be applied upon remand. 984 F.2d at 1273 n.3 (App. 4a n.3).

admiralty law and federal preemption, and there is no conflict between the First Circuit's decision and the holding of the Eleventh Circuit in *Howard v. Uniroyal*, 719 F.2d 1552 (11th Cir. 1983).

II. THE FIRST CIRCUIT'S DECISION IS CONSISTENT WITH EXISTING ADMIRALTY LAW

The best answer to Exxon Shipping's claim that the First Circuit's decision is inconsistent with federal maritime law is contained in the First Circuit's decision itself, which contains a thorough and well-reasoned discussion of admiralty law and of the reasons why that law does not displace state employment discrimination statutes. See 984 F.2d at 1278-81 (App. 16a-20a).

Indeed, Exxon Shipping essentially agrees with the proposition that state law is only preempted if its application would frustrate some fundamental tenet of

federal admiralty law. It argues, however, that the principle of uniformity is itself a sufficiently fundamental principle of admiralty law that state employment discrimination laws should be found to be preempted. *See* Petition at 14.

This argument proves too much. If uniformity in and of itself were a sufficiently important tenet of admiralty law to displace state laws, almost all state statutes would be preempted in the maritime area. This is not the law. As this Court observed in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959), federal courts have enforced state laws even when those laws conflict with a federal rule of maritime law. *See also id.* at 374 (state and federal governments "jointly exert regulatory powers" with respect to maritime activity). This result is

consistent with the "saving to suitors" clause in 28 U.S.C. § 1333(1), which gives federal courts original jurisdiction of any civil case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled."

Exxon Shipping cites two decisions for the proposition that state employment discrimination laws are preempted by federal maritime law. One of those cases, *Belanger v. Keydril Co.*, 596 F.Supp. 823 (E.D.La. 1984), *aff'd mem.*, 772 F.2d 902 (5th Cir. 1985), holds precisely the opposite. In that case the Louisiana age discrimination statute was found applicable, and the plaintiff's age discrimination case was tried to a jury. *See* 596 F.Supp. at 824, 827-29.

In the second case, *Indiana Civil Rights Commission v. American Commercial*

Barge Line Co., 523 N.E.2d 241 (Ind.App. 1988), *cert denied*, 492 U.S. 920 (1989), the Indiana Court of Appeals for the First District based its understanding of the preemptive effect of federal maritime law on language contained in this Court's 1920 decision in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 158, 160 (1920). *See* 523 N.E.2d at 244, 245. What the Indiana Court either did not know or ignored, however, was that in 1973 this Court stated that its decisions in *Knickerbocker Ice* and *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) -- another case relied upon by Exxon Shipping -- "have been limited by subsequent holdings of this Court." *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 338 (1973) (reversing a lower court decision that had held a Florida statute to be preempted on the basis of *Jensen* and

Knickerbocker Ice).

As *Askew* demonstrates, the modern rule is that state law is only displaced in those "isolated instances" where federal uniformity is required, not for its own sake, but to preserve an independent and fundamental principle of federal admiralty law. *Askew*, 411 U.S. at 338; *Romero*, 358 U.S. at 373-74. No such principle has been identified in this case.[4]

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[4]Exxon Shipping suggests in passing, based upon the *Indiana Civil Rights Commission* case, that the federal doctrine of seaworthiness may be implicated in cases involving physical disabilities. As the First Circuit recognized, this does not lead to the conclusion that state employment discrimination laws are preempted in their entirety but would only justify preemption if state law specifically conflicted with the doctrine of seaworthiness in a given case. 984 F.2d at 1280 (App. 19a-20a). This is unlikely to happen. Maine law, for instance, recognizes a defense based on a bona fide occupational qualification, 5 Me.Rev.Stat.Ann. §4572(1), and any legitimate physical requirements for seamen under the federal seaworthiness doctrine would constitute bona fide occupational qualifications under Maine law.

III. THERE IS NO CONFLICT BETWEEN THE FIRST CIRCUIT'S DECISION AND THE DECISION OF THE ELEVENTH CIRCUIT IN *HOWARD v. UNIROYAL, INC.*

Exxon Shipping's remaining preemption argument is based on section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. On this issue, Exxon Shipping urges that its petition for certiorari be granted because it contends that there is a conflict between the First Circuit's decision and the opinion of the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

Once again, the best answer to this argument is contained in the First Circuit's decision itself, which carefully considered and distinguished *Howard*. 984 F.2d at 1275-76 (App. 10a-11a). As the First Circuit noted, *Howard* did not involve the issue of whether section 503 preempts state employment discrimination

laws but was limited to the question of whether state contract remedies could be used to enforce section 503 itself. *Howard* thus does not support the proposition that Congress, by requiring that affirmative action provisions be inserted in federal contracts, thereby intended to immunize all federal contractors from state employment discrimination law.

In rejecting that proposition, the First Circuit was plainly correct. There is nothing in either the language or the legislative history of section 503 that evinces any congressional intent to preempt state law. *See* 984 F.2d at 1274-75, 1276-77 (App.7a-9a). Indeed, Congress has consistently opted against any preemption of state employment discrimination laws. *See* 984 F.2d at 1276 (App. 11a). Especially given the well-settled principle that the presumption is

against preemption, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992), there is absolutely no merit to Exxon Shipping's argument that in enacting section 503, Congress intended to immunize any employer who does $2500 worth of business with the federal government from the application of state employment discrimination statutes.

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), this Court stated that "[t]he principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." In this case the nature of the regulated

subject matter -- employment discrimination -- is an area in which the absence of preemption is the rule. Moreover, there is no evidence of any Congressional intent in the Rehabilitation Act, unmistakable or otherwise, to exclude state remedies.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 28, 1993 Respectfully submitted,

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No. 92-1589

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Supreme Court of the United States
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and

STATE OF MAINE,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Respondents' opposition to the petition for a writ of certiorari discounts the disruption the First Circuit's decision poses to the maritime industry. As a result, respondents dismiss the importance of this case to an industry critical to the national interest. Respondents also ignore the impact of Supreme Court precedent holding that where no particular state has a significant interest in a maritime dispute, there is no "local but maritime" rationale to apply state law and undermine the uniformity of admiralty law.

In addition, analysis of *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), shows that the Eleventh

Circuit—in conflict with the First Circuit—has held that Congress intended to require uniform standards of conduct in the area of handicap discrimination for federal contractors. Respondents' efforts to distingiush the two cases are off point.

Finally, Ellenwood unabashedly distorts the trial record in contending that his contract claims were based on something other than an employee substance abuse policy. Such distortions may not avoid the question for which review is sought: should maritime law recognize an exception to the at-will employment doctrine based on representations contained in an employee policy statement.

I. THE FIRST CIRCUIT APPLICATION OF STATE HANDICAP DISCRIMINATION LAWS TO MARITIME EMPLOYMENT SHOULD BE REVIEWED BY THE COURT

A. Both the State and Ellenwood Misconstrue the Disruptive Effect the First Circuit's Decision Will Have on the Maritime Industry

Both the State of Maine (the "State") and Theodore and Ann Ellenwood ("Ellenwood") misconstrue the disruptive effect the First Circuit's decision will have on the maritime industry. For its part, the State contends that the Americans With Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, somehow "totally undercuts" concerns about inconsistent and uncertain standards governing handicap discrimination in maritime employment. *See* State of Maine's Brief in Opposition at 5 ("State Br."). From that proposition, the State argues that this case is no longer important to the maritime industry. *Id.* But enforcement of a federal statute, be it the ADA or the Rehabilitation Act of 1973, § 503, 29 U.S.C. § 793, is enforcement of a single standard of conduct, not enforcement of up to 50 disparate standards of conduct. The fact that the ADA does not, by its terms, preempt state discrimination laws is irrelevant to

the issue posed by the decision of the First Circuit: is there a need to disrupt the harmony of admiralty by requiring maritime enforcement of various state handicap discrimination statutes.[1]

Both the State and Ellenwood wrongly argue that choice of law rules will immunize maritime employers from inconsistent application of state laws. *See* Ellenwood Br. at 14 n.9, 17-18; State Br. at 7 n.3. It may well be true that, under the First Circuit decision, an individual seaman may recover under only one state handicap discrimination law on a given claim. But years into this litigation it is still undecided as to which of the state statutes alleged by Ellenwood (Maine, New Jersey or Texas) apply, and the First Circuit decision guarantees such uncertainty will become an abiding characteristic of maritime law. Choice of law principles offer no relief to the maritime employer.

Factors applied in any given interest analysis will differ among crew members on board a single ship. A crew will consist of residents of many different states; hiring locations will vary; crew members will sail on different voyages at different times. For each crew member on board a ship a different result may well flow from the application of conflict rules, even to the extent that such

---

[1] Ellenwood asserts that state handicap discrimination laws "already play a large role" in the development of rules of conduct for employers under federal handicap discrimination statutes. Ellenwood Brief in Opposition at 15-16 ("Ellenwood Br."). From this truism, Ellenwood argues that application of 50 state laws will pose no danger to the harmony and uniformity of maritime law. *Id.* Of course, it is one thing to apply the amalgam of laws derived from various sources to create a single comprehensive federal standard governing handicap discrimination. It is something else to apply each of those differing sources of law to specific disputes.

It *is* relevant that the ADA and the Rehabilitation Act already protect seamen from handicap discrimination—without any injury to maritime uniformity. Contrary to Ellenwood's argument, Ellenwood Br. at 18, there is no practical or humanitarian need to extend that protection by application of disparate state laws.

rules are themselves uniform. The maritime employer will face the regulatory nightmare of complying with inconsistent handicap discrimination standards and procedures on board a single ship. *See* Petition for Certiorari at 10-14. This illustrates what makes the maritime industry different from land-based industries. On land, even a multi-national employer usually will face common obligations to employees at a single plant. Choice of law rules do not, by any measure, lessen the impact of the First Circuit decision on the maritime industry.

The heavy reliance placed by Ellenwood on *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 372 U.S. 714 (1963), underscores his misunderstanding of the chaotic effect application of state handicap discrimination laws will have here. In *Continental Airlines* the Court held that a Colorado race discrimination statute would not place an unconstitutional burden on interstate commerce.[2] The Court correctly found that in the area of racial discrimination (in sharp contrast to handicap discrimination) "the threat of diverse and conflicting regulation is virtually non-existent." *Id.* at 721. Should the First Circuit decision stand, maritime employers will inevitably face the diverse and conflicting regulation that maritime law seeks to avoid.

B. In the Absence of a Substantial Single State Interest, Supreme Court Precedent Prohibits Disruption of Maritime Uniformity

Most of the discussion of cases by the respondents on the principles governing state law supplementation of maritime law is unobjectionable save for one fatal infirmity. Respondents fail to note that this Court will not permit substantial disruptions of admiralty's uniformity by application of a state law unless that state has a localized

---

[2] The commerce clause has never demanded the same degree of harmony and uniformity that has been the hallmark of maritime law. *Compare Sproles v. Binford*, 286 U.S. 374 (1931) *with Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1917).

and important interest in the application of its law. The First Circuit's adoption into maritime law of disparate state handicap discrimination laws, when no single state has a local interest to be served, has no support in the precedents of the Court.

There is no disagreement that maritime law has room to accommodate state law. But it is also undisputed "that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1958). The wooden application of state law advanced here by respondents—and adopted by the First Circuit—ignores "the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." *Id.* In each case discussed by the respondents, this Court identified localized state interests before permitting application of a state law to a situation that would disrupt admiralty's uniformity. It is not enough to say that states generally have an interest in the subject of employment discrimination. *See* Ellenwood Br. at 14. For a state law to intrude into admiralty's harmony, a specific state must have a significant and important localized interest in the conduct being regulated. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (holding that Pennsylvania's workers compensation law may be applied in case of *land-based* injury) (*see* Ellenwood Br. at 16); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343 (1973) (holding that Florida's shoreline oil spill clean-up requirements may be applied in a case involving "sea-to-shore pollution" on Florida's coast) (*see* State Br. at 11-12); *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961) (refusing to apply New York's statute of frauds where the contract at issue was not one "peculiarly a matter of state law and local concerns") (*see* Ellenwood Br. at 13). Where there is no localized single state interest, there is no place in admiralty for application of a particular state's law.

II. THERE IS A MATERIAL SPLIT BETWEEN THE ELEVENTH CIRCUIT AND THE FIRST CIRCUIT ON THE PREEMPTIVE EFFECT OF SECTION 503 OF THE REHABILITATION ACT

Both Ellenwood and the State misconstrue the conflict between the decision of the First Circuit and the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc., supra.* Here, the First Circuit interpreted the Congressional intent underlying section 503 of the Rehabilitation Act and concluded that Congress was unconcerned over consistency in the standards of conduct for federal contractors. 984 F.2d at 1270. As a consequence, the First Circuit found no federal preemption of Ellenwood's state handicap discrimination or state contract claims. In sharp conflict was the Eleventh Circuit's finding that Congress intended a uniform rule of conduct for federal contractors. As a consequence of *that* interpretation, the *Howard* court held that Congress preempted state contract claims based on the same conduct regulated by section 503. *Howard*, 719 F.2d at 1561.

Neither Exxon Shipping nor the district court contended that there is a complete identity of *claims* between *Howard* and this case. Preemption of state claims is determined by analysis of the conduct regulated by federal law, not by reference to the legal theories advanced to attack such conduct. *See Peterson v. Air Line Pilots Ass'n, Int'l,* 759 F.2d 1161, 1168 (4th Cir.), *cert. denied,* 474 U.S. 946 (1985), *citing San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244-45 (1959). The conduct at issue underlying Ellenwood's claims based on statute (unlike *Howard*) and contract (like *Howard*) is the identical conduct underlying Ellenwood's claim filed with the federal government under section 503 of the Rehabilitation Act. That this action is based on "unrelated causes of action," Ellenwood Br. at 6, is arguable. That this action is based on the identical conduct regulated by section 503 is not .

Either section 503 is preemptive of state claims based on conduct regulated by the Rehabilitation Act or it is not. On that point, the First Circuit and the Eleventh Circuit are in conflict. This is an issue of significant importance to federal contractors nation-wide. The Court should resolve that conflict.

III. ELLENWOOD'S CONTRACT CLAIMS WERE BASED ON EXXON SHIPPING'S EMPLOYEE SUBSTANCE ABUSE POLICY

Ellenwood grossly distorts the basis of his contract claims which, at trial, were unquestionably based on Exxon Shipping's employee substance abuse policies.[3] Transparently, Ellenwood seeks to avoid review by the Court of the First Circuit's first impression ruling permitting a maritime at-will employee to infer an employment contract from an employee policy statement. That important question of law should not be lost by Ellenwood's recasting of his contract claims.

In his opening statement, *see* Tr. Vol. I at 29-47, and his closing statement, *see* Tr. Vol. XI at 76-77, Ellenwood referred solely to Exxon Shipping's substance abuse policy as a basis for his contract claims. The district court's jury instruction could not be clearer:

> "Contract. The first claim is pursued by Mr. Ellenwood alone. He claims that Exxon Shipping entered into a contract with him that it would not relieve him of his duties as a chief engineer for seeking alcohol rehabilitation . . .
>
> "The language focused on by the parties is that contained in the various Exxon Shipping policy provi-

[3] There was some dispute at trial whether a 1987 or a 1984 substance abuse policy was in effect during 1988 when Ellenwood was hospitalized for alcohol abuse. That dispute is immaterial here: in either case, Ellenwood's contract claims were based on Exxon Shipping's substance abuse policy. Both the district court and the First Circuit were well aware of this. *See* A.3, A.21, A.28.

sions concerning employee use of alcohol and rehabilitation."

Tr. Vol. XI at 43-44. Diversionary assertions by Ellenwood should not distract the Court from reviewing the First Circuit's recognition of an implied maritime employment contract based on an employee policy statement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-1589

In The

Supreme Court of the United States

October Term, 1992

EXXON SHIPPING COMPANY,

Petitioner,

v.

THEODORE M. ELLENWOOD and
ANN M. ELLENWOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

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Respondents Eilenwood oppose the Motion for Leave to File a Brief as Amici Curiae by the American Institute of Merchant Shipping, American Waterways Operators, and Lake Carriers' Association in Support of Petitioner for the following reasons:

1. The instant motion should be dismissed because Movant American Waterways Operators never sought Respondents' consent to file a brief in this case.

2. The instant motion should be dismissed because Movant Lake Carriers' Association never sought Respondents' consent to file a brief in this case.

3. The Motion and Brief as Amici Curiae should be dismissed because they do not comply with Rule 9.1 of this Court.

4. Rule 37.2 of this Court specifically provides that the instant motion "is not favored."

5. Upon information and belief, Respondents believe that Petitioner is a member of one or more of the movant organizations and that the Amici brief is merely Petitioner's veiled attempt to reargue the first question presented in its Petition for Writ of Certiorari.

6. The Motion and accompanying Brief merely rehash the arguments already presented to the Court.

7. Movants' argument based upon the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* ("ADA") is meritless. The purported uniformity issues have actually been rendered largely academic by the ADA. The ADA's anti-preemption provisions allow the application of state laws of greater or equal protection to a case such as the instant one (assuming it were to arise

after the July 25, 1992 effective date of the ADA, 42 U.S.C. §12201(b)). Congress has not created any special exception to these standards for maritime employers.

8. The reference to *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) misreads the import of that decision. There the Court was concerned with the use of state law to invalidate maritime rights. The Court specifically distinguished that situation from one "where state law had the effect of supplementing the remedies available in admiralty for the vindication of maritime rights." *Id.*, 365 U.S. at 741-42.

9. Furthermore, the facts of this case do not threaten uniformity. Under the ADA, perceived alcoholics are protected as individuals with a disability 42 U.S.C. §12114.

WHEREFORE, Respondents respectfully pray that the Court deny the motion.

Dated: Portland, Maine
June 9, 1993

Respectfully submitted,

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for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*; BRIEF FOR THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Institute of Merchant Shipping, American Waterways Operators, and Lake Carriers' Association hereby move pursuant to Rule 37.2 for leave to file a brief as *amici curiae* supporting the petitioner in this case. A motion is necessary because respondents Theodore M. and Ann M. Ellenwood have refused to consent to the filing of the brief.

The court of appeals below held that a maritime employment relationship that has no dominant connection with any particular state and is not local in character nonetheless is governed by state law (in this case, state human rights statutes) rather than general maritime law. That holding directly affects the interests of all shipowners and operators whose vessels sail from state to state or on the high seas. Movants are trade associations that

represent a broad spectrum of such shipowners and operators.

The American Institute of Merchant Shipping ("AIMS") is a trade association that represents the interests of the United States merchant shipping industry in the many areas affecting promotion, ownership, and operation of U.S.-flag vessels. Its members include persons who own, operate, or charter U.S.-flag vessels and who employ seamen in connection with the operation of those vessels. AIMS regularly and actively attempts to further the interests of its members by appearing before federal agencies, by participating in litigation as a party or as *amicus curiae,* by providing testimony before Congress, by involvement in activities of international organizations, and in other ways. The accompanying brief *amici curiae* has been carefully reviewed and formally approved by a majority of AIMS' members and is being submitted on their behalf.

American Waterways Operators ("AWO") is the national trade association for the inland and coastal barge and towing industry, encompassing approximately 800 towing companies with nearly 180,000 employees. The mission of AWO is to serve as the definitive spokesman for this industry; its objectives are to inform members on federal actions and proposals affecting their interests, to represent those interests before the federal government, and to promote the highest standards of health, safety, and training. The accompanying brief *amici curiae* is submitted on behalf of those members of AWO whose vessels regularly ply the inland or coastal waters of several states and whose operations are nonlocal in character.

Lake Carriers' Association ("LCA") is the trade association for operators of U.S.-flag freighters on the Great Lakes and as such actively represents the interests of its members before legislative and regulatory bodies and also conducts studies and compiles statistics on matters relating to their operations. LCA recently completed a study

of bona fide occupational qualifications for mariners in order to facilitate its members' compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and thus has a special interest in whether the uniform federal requirements applicable to its members' operations may be superseded or supplemented by variant state legislation.

By virtue of their wide and diverse memberships and their long familiarity with and involvement in maritime matters, movants can assist the Court in understanding the historical context and vital importance of the question of general maritime uniformity that this case presents. For more than a century, at least since *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), nonlocal maritime employment relationships between shipowners and the seamen who man their vessels have been governed by federal admiralty law rather than by the inharmonious and nonuniform prescriptions of state law. *See Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741 (1961). The decision of the First Circuit in this case marks a dramatic departure from this settled legal principle; the issue thus raised is one of grave concern to movants, their members, and maritime employers generally.

For these reasons, movants ask leave to file the accompanying brief.

Respectfully submitted,

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QUESTION PRESENTED

This brief *amici curiae* addresses the following question:

Whether, contrary to *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918), and other similar decisions of this Court, state law rather than general maritime law governs a maritime employment relationship that has no dominant connection with any particular state and is not local in character.

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---

BRIEF FOR THE AMERICAN INSTITUTE OF MERCHANT SHIPPING, AMERICAN WATERWAYS OPERATORS, AND LAKE CARRIERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Institute of Merchant Shipping ("AIMS") is a trade association that represents the interests of the United States merchant shipping industry in the many areas affecting promotion, ownership, and operation of U.S.-flag vessels. Its members include persons who own, operate, or charter U.S.-flag vessels and who employ seamen in connection with the operation of those vessels. AIMS regularly and actively attempts to further the interests of its members by appearing before federal

agencies, by participating in litigation as a party or as *amicus curiae*, by providing testimony before Congress, by involvement in activities of international organzations, and in other ways.

American Waterways Operators ("AWO") is the national trade association for the inland and coastal barge and towing industry, encompassing approximately 800 towing companies with nearly 180,000 employees. The mission of AWO is to serve as the definitive spokesman for this industry; its objectives are to inform members on federal actions and proposals affecting their interests, to represent those interests before the federal government, and to promote the highest standards of health, safety, and training.

Lake Carriers' Association ("LCA") is the trade association for operators of U.S.-flag freighters on the Great Lakes and as such actively represents the interests of its members before legislative and regulatory bodies and also conducts studies and compiles statistics on matters relating to their operations.

In short, *amici* represent a broad spectrum of shipowners and operators whose vessels sail from state to state and on the high seas and whose interests thus will be directly and significantly affected by the decision in this case.

STATEMENT

The facts directly relevant to the issue of principal concern to *amici* and their members may be briefly stated. Respondent Theodore M. Ellenwood ("Ellenwood") was a maritime employee of petitioner Exxon Shipping Company ("Exxon"). Although Ellenwood is a resident of Maine, his employment relationship with Exxon had little or no connection with any particular state: he served as chief engineer on a ship that "plies the coastal waters of the United States, thus touching the jurisdiction of many states." Pet. App. 42a-43a n.5. Exxon removed Ellenwood from his position as chief engineer in 1989 because

of his history of alcohol abuse. Pet. App. 39. Ellenwood then brought this action, contending, *inter alia,* that his removal violated one or more of the human rights statutes of Maine, New Jersey, or Texas.

The district court rejected this claim. Citing *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the court ruled that "the applicable law is maritime law, not state law." Pet. App. 42a. The court further determined that in applying maritime law it would not "defer to local policy, [for] it is apparent that this is the type of case that cries out for uniformity." *Id.* at n.5. The court reasoned that due to the nonlocal nature of Ellenwood's employment, no single state "has a peculiar interest in the contractual relationship. These are the kinds of considerations that led the Court in *Kossick* . . . to conclude that local law should not apply but that a uniform maritime law should govern." *Id.*

The court of appeals reversed. Extrapolating from cases involving maritime accidents in state territorial waters, the court reasoned that admiralty courts must apply state law " 'absent a clear conflict with the federal [maritime] law.' " Pet. App. 16a, quoting *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973) (brackets added by court of appeals). Perceiving "nothing in substantive maritime law that is even potentially at odds with state human rights statutes," *id.* at 18a, the court held that Ellenwood could pursue his claim under state law. The court offered no guidance, however, concerning which state's law would control; that issue was left for consideration by the district court on remand. *Id.* at 4a n.3.

ARGUMENT

As a rule, the respective rights and obligations of maritime employers and the seamen they hire are determined by reference not to state law but to general maritime law. *See, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-11 (1953); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 381-82 (1917); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217-18 (1917). General maritime law is "a system of law coextensive with, and operating uniformly in, the whole country. . . . [T]o place the rules and limits of maritime law under the disposal and regulation of the several States . . . would . . . defeat[] the uniformity and consistency at which the Constitution aimed . . . ." *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875).

To be sure, "the doctrines of the uniformity and supremacy of the maritime law" are not absolute. *Kossick*, 365 U.S. at 738. The relationship between maritime law and state law is one of accommodation. *Id.* at 739. A court sitting in admiralty may defer to local law where local concerns are paramount—where, that is, "[t]he subject is maritime and *local in character* and the [application of state law] will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (emphasis added). But where no single state has "any 'pressing and significant' interest," there is no basis or justification for the "application of state-law principles." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 n.2 (1986), quoting *Kossick*, 365 U.S. at 739. In such circumstances, "the Admiralty Clause itself has a pre-empting negative effect on state law . . . ." D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Review 158, 166 (1960).

The First Circuit in this case fundamentally mistook the respective roles of federal and state law in cases falling within the admiralty jurisdiction. In admiralty, there is no presumption that state law will govern in the absence of a clear conflict with federal law. The presumption is just the opposite: general maritime law controls unless the pertinent facts are of such manifestly local character that the state's interest in enforcing its own law within its own geographical boundaries outweighs the need for and value of maritime uniformity. *Compare Kossick*, 365 U.S. at 741, *with Just v. Chambers*, 312 U.S. 383, 389 (1941). This means that general maritime law, not the human rights statute of some as-yet undetermined state, must govern nonlocal maritime employment relationships such as that between Exxon and Ellenwood. The decision below to the contrary squarely conflicts with *Kossick*, *Chelentis*, and other similar cases.

Ellenwood's maritime employment manifestly was not "local in character." *Western Fuel*, 257 U.S. at 242. To the contrary, his employment was distinctly *nonlocal* in character. *See* Pet. App. 42a-43a n.5. Ellenwood is the archetypal seaman, whose movements from port to port and on the high seas both illustrate and verify the need for a uniform set of legal rules governing maritime employment. "Considering that sailors of any nationality may join a ship in any port, . . . this is such a contract as may well have been made anywhere in the world, and . . . the validity of it should be judged by one law wherever it was made." *Kossick*, 365 U.S. at 741. *See also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1950) ("the place of contracting is largely fortuitous and of little importance"). Nonlocal maritime employment relationships such as this lie at the very core of admiralty jurisdiction and general maritime law. Subjecting such employment relationships to the vagaries of state law would remove a major cornerstone from the ancient doctrine of maritime uniformity.

The rationale for the occasional application of state law in maritime settings is that "a State, in the exercise of its police power, may establish rules applicable on land and water *within its limits*, even though these rules incidentally affect maritime affairs, provided that the state action 'does not . . . work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' " *Just v. Chambers*, 312 U.S. at 389 (emphasis added). Thus, states may furnish remedies for maritime wrongs that maritime employers commit in state territorial waters; such remedies do not disturb the uniformity of the underlying standards of conduct to which maritime employers must conform. *See, e.g., Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-24 (1924); *Western Fuel*, 257 U.S. at 242. To a limited degree, states also may impose substantive standards of conduct to be followed within territorial waters. *E.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588, 590-91 (1959). The First Circuit arrived at the result below by improperly generalizing from cases of this kind, which deal with matters of peculiarly local concern.

The First Circuit erred by confusing the exception (state-law principles) with the rule (general maritime law). It is well established that states may not impose their own substantive standards of conduct on maritime activities that are *not* "peculiarly a matter of state and local concern." *Kossick*, 365 U.S. at 741. In particular, states are not empowered to vary the rights and liabilities established by and associated with the employment relationship between shipowner and seaman; as this Court has held repeatedly and explicitly, those rights and liabilities must be uniform and remain the same wherever the ship may sail and whatever its port of call. *Kossick*, 365 U.S. at 741; *Pope & Talbot*, 346 U.S. at 408-11; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942); *Robins Dry Dock & Repair Co.*

v. Dahl, 266 U.S. 449, 457 (1925); *Union Fish Co. v. Erickson,* 248 U.S. 308, 313-14 (1919); *Chelentis,* 247 U.S. at 381-82; *Southern Pacific,* 244 U.S. at 217-18.

The First Circuit's decision flies in the face of these cases and the principle they establish. Its decision, moreover, is thoughtlessly impractical as well as doctrinally impure. If nonlocal maritime employment relationships were to be made subject to the varying standards of local law, there would be no way a maritime employer could know, either as a general matter *or in this very case,* which state's law would control. This would pose something of an administrative nightmare: as to each and every seaman, the maritime employer would be forced to try to conform its employment practices and policies to the inharmonious and nonuniform prescriptions of many, if not all, of the 50 states. A central purpose of general maritime law is to relieve the shipowner from precisely that predicament: "it is almost impossible for [the master] to acquaint himself with the laws of each individual State he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go." *The Roanoke,* 189 U.S. 185, 195 (1903).

In many instances, conformity with the law of each state may be literally impossible. Even state human rights statutes differ greatly in their coverage. *See* Pet. 11-12. And when states do agree concerning what constitutes a legally protected physical or mental handicap, they nevertheless may disagree respecting the remedial measures an employer must take. *Id.* at 12-13. Of special concern to maritime employers is the risk that different states could insist upon different and incompatible shipboard configurations or other physical conditions of employment. Such requirements would, without question, seriously "disturb the uniformity of maritime law." *Kossick,* 365 U.S. at 738.

Even if compliance with multiple state human rights statutes were not a "physical impossibility," *Florida Lime*

& Avacado Growers, Inc. v. *Paul*, 373 U.S. 132, 143 (1963), application of state law nonetheless would subject maritime employers to the inexorable logic of the lowest common denominator. Not knowing which state's law might apply to which seamen or potential seamen, the maritime employer would find it necessary, as to each of the innumerable "physical and mental conditions [that] may be subsumed under the rubric of 'handicap,' " A. Larson, 3A *Employment Discrimination* § 107.32(a) at 22-121 to 22-122 (1993), first to identify and then to comply with the law of the state that treats that handicap most generously—no matter how ill-considered that law may be from the perspective of maritime employment and maritime operations. For example, as regards obesity the martime employer might be constrained to comply with the law of New York, which treats that condition as a protected employment handicap; whereas as regards high blood pressure, which New York does not consider an employment handicap, the employer might be constrained to comply with the law of California, which does view high blood pressure as a handicap. *See* Pet. 11-12. In this way, the dominant contours of the maritime employment relationship could become the plaything of even inland state legislatures—a vivid example of the tail wagging the dog.

This case not only "cries out for uniformity," Pet. App. 42a n.5, it cries out for the application of a genuinely maritime body of law responsive to important maritime concerns. A maritime employer's overriding obligation is "to furnish a seaworthy vessel and crew." *Indiana Civil Rights Comm'n* v. *American Commercial Barge Line Co.*, 523 N.E.2d 241, 244 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989). State human rights statutes are not responsive to the need for seaworthiness and to the vital role seaworthiness plays in the evaluation of prospective and current seamen. Maritime employers should not be placed in the crossfire of seaworthiness obligations imposed by the general martime law and employment obli-

gations imposed by state legislatures having no sensitivity to or experience with maritime matters—even if the states, by happenstance, have established generally similar or even identical rules. *See id.* at 244-45 (holding that maritime employment is outside the reach of state laws relating to the employment rights of the visually impaired). Moreover, it is not enough to say, as the First Circuit did in this case, Pet. App. 19a-20a, that seaworthiness concerns may be available to the maritime employer as a defense to claims of employment discrimination on a case-by-case basis. Maritime employers should be able to adopt and adhere to reasonable rules designed to safeguard seaworthiness, as Exxon did here in establishing a rule with respect to alcohol abuse, without being forced to litigate the propriety of individual applications of those rules as a matter of state law.

There is no true humanitarian need for the contrary result reached by the First Circuit in this case. To the extent necessary and appropriate, American seamen are adequately and fully protected by federal law. Most if not all major martime employers have long been subject to section 503(a) of the Rehabilitation Act of 1973; 29 U.S.C. § 793(a), which requires federal contractors to "take affirmative action to employ and advance in employment qualified individuals with handicaps." And now all such employers are subject to the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* In these circumstances—and in contrast, for example, to the situation prevailing with respect to claims for wrongful death prior to the enactment of the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq., see The Hamilton,* 207 U.S. 398, 404 (1907)—there is no need or justification for state supplementation of the federal rules pertaining to maritime employment.

If left standing, the decision below is likely to work considerable mischief. That mischief—like the First

Circuit's reasoning that gives rise to it—cannot easily be confined just to the narrow realm carved out by state human rights statutes. By ignoring the most basic limitation on the applicability of state law in admiralty—that only maritime activities that are strictly "local in character," *Western Fuel,* 257 U.S. at 242, may be made subject to substantive state law standards—the First Circuit has opened the door to state interference with and control of all aspects of maritime employment. That way lies chaos.

This Court should grant review in this important case in order to reestablish and confirm the uniformity and supremacy of the general maritime law as it applies to nonlocal maritime employment relationships.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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